United States Court of Appeals

for the Second Circuit

APPENDIX

77-7182

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FILED
MAY 27 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

ERIC E. SMITH,

Plaintiff-Appellant,

vs.

AMERICAN PRESIDENT LINES, LTD., *et al.,*

Defendants-Appellees.

Civil Action No. 75 Civ. 2507 (CMM)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

B P/L

APPENDIX

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RELEVANT DOCKET ENTRIES

May 28, 1975	Compliant filed
September 9, 1975	Amended Answer of Marine Engineers Beneficial Association filed
September 10, 1975	Second Amended Answer of American President Lines filed
August 20, 1976	Notice of Motion to dismiss complaint filed with APL Rule 9(g) statement
August 27, 1976	Plaintiff's Rule 9(g) statement filed with Affidavit of Plaintiff
December 14, 1976	Opinion filed granting in part and denying in part APL's motion to dismiss
January 24, 1977	Opinion filed on reargument granting APL's motion to dismiss
March 18, 1977	Stipulation of dismissal and judgment of dismissal entered
April 15, 1977	Notice of Appeal filed by Plaintiff

[CAPTION]

COMPLIANT

Filed: May 28, 1975

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1343 (4); 42 U.S.C. §2000e et seq. and 28 U.S.C. §2201 and 2202. This is a suit in equity authorized and instituted pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et eq. The jurisdiction of this Court is invoked to secure protection of and to redress deprivation of rights secured by (a) 42 U.S.C. §2000e et seq., providing for injunctive and other relief against racial discrimination in employment and (b) 42 U.S.C. §1981, providing for the equal rights of all persons in every state and territory within the jurisdiction of the United States. Jurisdiction of this Court is also invoked pursuant to 29 U.S.C. §151 et seq., based on violations of the duty of fair representation owed to plaintiff.

2. This is a proceeding for a declaratory judgment as to plaintiff's rights and for a permanent injunction, restraining defendants from maintaining a policy practice, custom or usage of: (a) discriminating against plaintiff because of his race and color with respect to his compensation, terms, conditions and privileges of employment, and (b) failing to

fairly represent the plaintiff.

3. Plaintiff Eric E. Smith is a black citizen of the United States and a resident of the State of New York. He has been represented by the Marine Engineers Beneficial Association, AFL-CIO, (hereafter, "the Union") since March 25, 1969. He was employed as a 2nd Assistant Engineer on the American President Lines' ship, the S.S. President Pierce, from approximately June 8, 1970, until October 6, 1970, when he was discharged by the Company from employment on the ship.

4. Defendant American President Lines, Ltd., is a corporation doing business in the State of New York, and the City of New York. The defendant company owns and operates sea going vessels and is an employer within the meaning of 42 U.S.C. § 2000e et seq.

5. Defendant Marine Engineering Beneficial Association, AFL:CIO, is a labor organization within the meaning of 42 U.S.C. §2000e et seq. in that it is engaged in an industry affecting commerce and exists, in whole or in part, for the purpose of dealing with the defendant company concerning grievances, labor disputes, wages, rates of pay, hours, and other terms or conditions of employment of the employees of the company in and around the City of New York in the State of New York. The union has approximately 2900 members and operates a hiring hall for the purpose of assisting members

obtain work with shipping companies, including the defendant company.

6. The defendant American President Lines, Ltd., has engaged in the following acts, policies, practices, customs and usages made unlawful by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., as amended, and the Civil Rights Act of 1866, 42 U.S.C. §1981:

A. Having hired the plaintiff on June 8, 1970 to work on its ship, the SS President Pierce, as a second assistance engineer, during the course of the voyage, the defendant discharged the plaintiff on October 5, 1970, for alleged incompetence. The plaintiff's discharge was on account of his race and color.

B. During the course of the voyage referred to in (A) above, the defendant, acting through its agents First Engineer Jack Donald Benjamin and Chief Engineer Irving Rinker, did harass the plaintiff on account of his race, and did subject him to abusive treatment and racial epithets on account of his race.

C. Subsequent to the voyage referred to in (A) above, the defendant filed charges of incompetence with the United States Coast Guard on account of the plaintiff's race, which charges were dismissed by the Coast Guard.

D. Subsequent to the voyage referred to in (A) above, the defendant filed charges of misconduct with the United

States Coast Guard on account of the plaintiff's race, which charges were intended to result in the plaintiff's loss of Coast Guard license, thereby depriving him of future employment. These charges were dismissed by the Coast Guard.

7. The defendant Marine Engineers Beneficial Association, AFL-CIO, has engaged in the following acts, policies, practices, customs and usages made unlawful by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., as amended, the Civil Rights Act of 1866, 42 U.S.C. §1981, and its duty of fair representation owed to the plaintiff expressed by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., as amended, and 29 U.S.C. §151 et seq.:

A. Failure to admit the plaintiff to full and unencumbered union membership on account of his race.

B. Failure to refer the plaintiff for work through its hiring hall according to its Group I preferential list on account of his race.

C. Failure to investigate the plaintiff's grievance which he filed subsequent to his discharge the SS President Pierce on October 5, 1970.

D. Failure to process the plaintiff's grievance which he filed subsequent to his discharge from the SS President Pierce on October 5, 1970.

E. Retaliation against the plaintiff for his having filed charges or racial discrimination pursuant to Title VII

of the Civil Rights Act of 1964 and pursued his remedies thereunder by currently challenging his application for membership with the union, which application has been accepted on April 25, 1969.

8. On October 14, 1970, the plaintiff filed a charge of racial discrimination against the defendants with the United States Equal Employment Opportunity Commission. The Equal Employment Opportunity Commission issued a Notice of Right To Sue to the plaintiff on May 6, 1975.

9. Plaintiff has no plain, adequate or complete remedy at law to redress the wrongs alleged herein and this suit for injunctive and other equitable relief is his only means of securing adequate relief. Plaintiff is now suffering and will continue to suffer irreparable injury from the defendants' policies, practices, acts, customs and usages as set forth herein.

WHEREFORE, plaintiff respectfully prays this Court to advance this case on the docket, order a speedy hearing at the earliest practicable date, cause this case to be in every was expedited and upon such hearing to:

1. Grant plaintiff a permanent injunction enjoining the defendants American President Lines, Ltd., and Marine Engineers Beneficial Association, AFL-CIO, their agents, successors, employees, attorneys and those acting in concert with them and at their direction from continuing to abridge the rights

of the plaintiff in the nammer set forth in Paragraphs 6 and 7 above;

2. Grant plaintiff declaratory and injunctive relief making him whole, by appropriate back pay and otherwise, and restoring the plaintiff to the position he would now hold but for the defendants' illegal acts;

3. Grant to the plaintiff an award of costs and reasonable attorneys fees;

4. Grant to the plaintiff all other equitable and just relief to which he may be shown to be entitled.

_____

ATTORNEYS FOR PLAINTIFF

[CAPTION]

FIRST AMENDED ANSWER

Filed: September 9, 1975

National Marine Engineers Beneficial Association, AFL-CIO and District No. 1-Pacific Coast District, Marine Engineers Beneficial Association, AFL-IO (incorrectly referred to in the Compliant herein as Marine Engineers Beneficial Association, AFL-CIO), Defendants in the above matter (hereinafter sometimes referred to collectively as Defendant Union) file the within Answer to the Complaint in this matter as follows:

FIRST DEFENSE

1. It is denied that this Court has jurisdiction over this action because it is denied that there has been any violation of the Civil Rights Act of 1964 42 U.S.C. §2000e, et seq., or of 42 U.S.C. §1981 or that Defendant Union has engaged in any racial discrimination in employment or deprived any personof any rights. It is denied that this Court has jurisdiction under the National Labor Relations Act because it is denied that there has been any violation of the duty of fair representation owed to plaintiff.

2. The allegations of paragraph 2 of the Complaint contain legal conculsions and do not require an answer.

3. The allegations of paragraphs 3 of the Complaint are denied except to admit that Plaintiff is an applicant for membership in District No. 1-Pacific Coast District, Marine

Engineers Beneficial Association and that he was employed as a second assistant engineer on the SS President Pierce from approximately June 8, 1970 until October 7, 1970, when he was discharged for cause by the Company from employment as a second assistant engineer on the aforesaid vessel.

4. After reasonable investigation, Defendant Union is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of the first sentence of paragraph 4 of the Complaint. The allegations of the second sentence of paragraph 4 of the Complaint are admitted.

5. The allegations of the first sentence of paragraph 5 of the Complaint are admitted. The allegations of the second sentence of paragraph 5 of the Complaint are admitted, except that it is denied that the Union has approximately 2,900 members or any number close to that figure.

6. After reasonable investigation, Defendant Union is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragrpahs 6 A, B, C and D of the Complaint and, therefore, denies same and demands proof thereof at the time of trial.

7. The allegations of paragraphs 7 and 7A of the Complaint are denied. The allegations of paragraph 7B of the Complaint are denied. The allegations of paragraph 7C of the Complaint are denied. The allegations of paragraph 7D of the

Complaint are denied. The allegations of paragraph 7E of the Complaint are denied.

8. The allegations of paragraph 8 of the Complaint first sentence, are denied.

9. The allegations of paragraph 9 of the Complaint are denied.

SECOND DEFENSE

10. Plaintiff has not, at any time, filed a grievance with the defendant Union or sought, in any way, to exercise the grievance procedure provided for in the collective bargaining agreement between Defendant Union and Defendant Employer with respect to the allegations of the Complaint herein. Plaintiff has failed to exhaust his remedies under the said collective bargaining agreement and is thus precluded from bringing this action.

THIRD DEFENSE

11. Plaintiff has failed to exhaust the internal remedies available to him under the Constitution of Defendant, National Marine Engineers Beneficial Association, including the Constitution for Districts and the By-Laws of the Marine Engineers Beneficial Association, District No. 1-Pacific Coast District. Plaintiff has made no complaint and filed no charges under and pursuant to the procedures of the said Constitution and By-Laws and his failure to exhaust his internal remedies precludes his bringing this action. Because of Plaintiff's failure to exhaust his internal remedies

available to him this Court is without jurisdiction over this action.

FOURTH DEFENSE

12. This Court is without jurisdiction over this action because plaintiff filed an amended charge with the Equal Employment Opportunity Commission on November 24, 1972 amending the charge filed on November 19, 1971 and deleting therefrom any reference to Defendant Union as having engaged in discrimination of Plaintiff by virtue or Plaintiff's race or color or by virtue of any other form of discrimination prohibited by Title VII of the Civil Rights Act of 1964, as amended. The charge of discrimination filed on November 24, 1972 superceded the charge filed on November 19, 1971 since it pertained to the same acts and occurrences. The Equal Employment Opportunity Commission was therefore without jurisdiction to issue a Notice of Right to Sue to the Plaintiff on May 6, 1975 with respect to Defendant Union, and this Court is equally without jurisdiction over this action with respect to Defendant Union.

FIFTH DEFENSE

13. The Defendant Union has not conspired in any way with any other party or engaged in any discrimination against Plaintiff because of his race or for any other reason and has not participated with Defendant Employer in any scheme or policy to discriminate against Plaintiff.

SIXTH DEFENSE

14. Defendant Union has not failed or refused to represent Plaintiff fairly or to provide him with fair and adequate representation. Defendant Union has at all times made an honest and good faith determination of any issues raised by Plaintiff when requested by Plaintiff to represent him or act in his behalf on any specific issue or claim made by him.

SEVENTH DEFENSE

15. The Complaint fails to state a cause of action upon which relief can be granted.

EIGHTH DEFENSE

16. The Plaintiff has failed to exhaust his remedies under State Law with respect to any act of discrimination alleged by Plaintiff to have been committed by Defendant Union. Plaintiff is thus precluded from insituting this action against Defendant Union at this time in this Court, since Plaintiff has not fulfilled the procedural requirements of 42 U.S.C. §§2000e-5(b), (c), (d), and (e).

NINTH DEFENSE

17. The Complaint is time-barred by virtue of the failure of Plaintiff to file a charge against Defendant Union within the period required by 42 U.S.C. §§2000e-5(e).

TENTH DEFENSE

18. The Complaint is time-barred by virtue of the failure of Plaintiff to file a Complaint against Defendant Union

within the applicable time period required for actions commenced under 42 U.S.C. §1981.

WHEREFORE, Defendant Union repectfully requests the Court as follows:

1. That an Order be entered by the Court directing that the Complaint herein be dismissed in its entirety.

2. That the action be stayed pending arbitration pursuant to the provisions of the applicable collective bargaining agreement.

3. That the action be stayed pending referral to the appropriate State agency.

4. That the Defendant Union recover the costs of suit and expenses and have such further, other, and additional relief that is just and proper in the circumstances.

DATED: NEW YORK, NEW YORK
September 5, 1975

/S/
Attorneys for Defendant Union

CAPTION

SECOND AMENDED VERIFIED ANSWER

Filed: September 10, 1975

AMERICAN PRESIDENT LINES, defendant in the above matter (hereinafter referred to as defendant-employer), files the within Answer to the Complaint in the matter as follows:

1. The allegations in paragraph 1 of the Complaint are admitted except that it is denied that this Court has jurisdiction pursuant to 29 U.S.C. §151 et seq.

2. The allegations set forth in paragraph 2 of the Complaint are admitted except that it is denied that defendant-employer maintains a policy, practice, custom or usuage as described therein.

3. Denies knowledge and information sufficient to form a belief with respect to the allegations set forth in paragraph 3 of the Complaint except that it is admitted that plaintiff was discharged on or about October 6, 1970.

4. The allegations in paragraph 4 and 5 of the Complaint are admitted except that defendant-employer denies knowledge and information sufficient to form a belief as to the number of members belonging to the defendant union.

5. Each and every allegation set forth in paragraph 6 of the Complaint is denied.

6. Defendant-employer denies knowledge and information sufficient to for a belief with respect to each and every allegation set forth in paragraph 7 of the Complaint.

7. The allegations set forth in paragraph 8 of the Complaint are admitted except that it is denied that Plaintiff filed charges against the defendants with the United States Equal Employment Opportunity Commission October 14, 1970.

8. The allegations set forth in paragraph 9 of the Complaint are denied.

FIRST AFFIRMATIVE DEFENSE

9. The Complaint is time-barred by virtue of the failure of plaintiff to file a charge against defendant-employer within the period required by 42 U.S.C. §2000e-5(e) and by virtue of the statute of limitations applicable to 42 U.S.C. §1981, et seq.

SECOND AFFIRMATIVE DEFENSE

10. The Complaint should be dismissed because the Equal Employment Opportunity Commission did not give substantial weight to the finding of the New York State Commission on Human Rights which dismissed the Complaint, as required by 42 U.S.C. §2000e-5(b).

THIRD AFFIRMATIVE DEFENSE

11. This Court is without jurisdiction to proceed pursuant to 29 U.S.C. §151, et seq, since the National Labor

Relations Board has exclusive jurisdiction to determine whether unfair labor practices have occurred within the scope of the statute.

FOURTH AFFIRMATIVE DEFENSE

12. Defendant-employer has not conspired in any way with any person or party or engaged in any conduct which has, or could tend to deprive plaintiff of his civil rights or in any other way acted to discriminate against the plaintiff on any basis or for any reason whatsoever.

FIFTH AFFIRMATIVE DEFENSE

13. The Complaint does not state a cause of action for which relief can be granted.

WHEREFORE, defendant-employer respectfully prays that the Court:

1. Enter an Order directing that the Complaint herein be dismissed in its entirety,

2. Allow reasonable costs and expenses to the defendant-employer, and any additional relief that is just, equitable and proper.

/S/ _____

Dated: New York, New York
September 9, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

ERIC E. SMITH,	:	
Plaintiff,	:	
v.	:	NOTICE OF MOTION OF AMERICAN PRESIDENT LINES, LTD. TO DISMISS
AMERICAN PRESIDENT LINES, LTD., and MARINE ENGINEERS BENEFICIAL ASSOCIATION,	:	
Defendants.	:	

----------x

S I R S:

Please take notice that upon the complaint and the annexed motion and memorandum, and its statement pursuant to General Rule 9(g), defendant American President Lines, Ltd. will move this Court pursuant to rules 12(b)(1) and (6) and 56 of the Federal Rules of Civil Procedure at Room 2201, United States Courthouse, Foley Square, New York, New York, on the 30th day of August, 1976 at 10:00 in the forenoon or as soon thereafter as counsel can be heard for an order granting its annexed motion to dismiss the complaint or in the alternative granting it summary judgment, and granting it such other further and different relief as may be just and proper.

Dated: New York, New York
August 18, 1976

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ERIC E. SMITH, Plaintiff,	:	CIVIL ACTION NO. 75 Civ. 2507 (CMM)
v.	:	DEFENDANT AMERICAN PRESIDENT LINES, LTD.'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT
AMERICAN PRESIDENT LINES, LTD., et al., Defendants.	:	

Defendant, American President Lines, Ltd., by its undersigned attorneys, pursuant to Rules 12(b)(1),(6) and 56 of the Federal Rules of Civil Procedure, moves this Court to dismiss the Complaint or in the alternative to grant it summary judgment for the following reasons:

1. This Court lacks jurisdiction of the Complaint under the Civil Rights Act of 1964 as amended in 1972.

2. The Complaint must be dismissed insofar as it alleges a violation of the Civil Rights Act of 1866.

3. The Complaint is barred by the doctrine of res judicata.

4. This Court lacks jurisdiction of the Complaint under 29 USC §151 et. seq.

For all the foregoing reasons and as more fully set forth in the attached Memorandum, American President Lines, Ltd. requests this Court to grant its Motion.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ERIC E. SMITH, Plaintiff, v. AMERICAN PRESIDENT LINES, LTD., et al., Defendants.	CIVIL ACTION NO. 75 Civ. 2507 (CMM) DEFENDANT AMERICAN PRESIDENT LINES, LTD.'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

Defendant, American President Lines, Ltd., contends as follows:

I. This Court Lacks Jurisdiction Of The Complaint Under The Civil Rights Act Of 1964 As Amended In 1972.

The Complaint invokes the jurisdiction of the Court pursuant to the Civil Rights Act of 1964 as amended in 1972, 42 USC §2000e et. seq. In support of jurisdiction, Plaintiff alleges in paragraph 8 that he had filed a charge of racial discrimination against Defendant American President Lines on October 14, 1970. However, no such charge was filed.

Defendant requests the Court to take judicial notice of the files of the New York State Division of Human Rights in Smith v. American President Lines, Case No. C-22329-70, Appeal No. 1074, and the files of the Equal Employment Opportunity Commission, New York District Office, Case No. TNY 2-0491. A review of those files will reveal the following:

1.	October 14, 1970	Plaintiff files a charge of discrimination with the New York State Division of Human Rights. (Exhibit 1)
2.	September 17, 1971	The New York State Division of Human Rights issues its opinion finding that Plaintiff

		had not been discriminated against by American President Lines in his discharge. (Exhibit 2)
3.	September 30, 1971	Plaintiff files an appeal of the New York State Division of Human Rights' opinion. (Exhibit 3)
4.	November 19, 1971	Plaintiff apparently files a charge of discrimination with the EEOC. (Exhibit 4)
5.	November 24, 1972	An identical charge, insofar as Defendant American President Lines is concerned, is filed. (Exhibit 5)
6.	December 4, 1972	The New York State Division of Human Rights informs Plaintiff that his rights under the New York Human Rights Law have been exhausted. (Exhibit 6)
7.	March 8, 1973	Defendant American President Lines is informed for the first time that a charge of discrimination has been filed with the EEOC. (Exhibit 7)
8.	May 6, 1975	Plaintiff received his Notice of Right to Sue in regard to his EEOC charge. (Exhibit 8)

The EEOC New York District Office file contains three charges identical in essence but not in wording as to the discrimination by Defendant alleged by Plaintiff. The first two charges are dated November 19, 1971. The Commission's files indicate that no case file number was assigned to either of these charges and neither was served upon Defendant American President Lines.

The third charge found in the EEOC's files is dated November 24, 1972. This charge bears EEOC No. TNY2-0491. Although Section 706(b) of the Civil Rights Act requires that defendant be informed within 10 days after the filing of the charge, no such notice was filed on Defendant. Instead on March 8, 1973, the EEOC informed Defendant of the charge in a letter requesting certain information in regard

thereto. Unfortunately, the actual charge was not sent to Defendant. In fact, Defendant has never received officially a Notice of Charge in this case although subsequent to March 8, 1973, it did obtain a copy of the Notice.

Section 706(e) of the Civil Rights Act requires that a charge of discrimination be filed within 180 days after the alleged unlawful employment practice has occurred. An exception to this requirement is found where the person aggrieved has initiated proceedings with a state agency. In these circumstances, "Such charge shall be filed by or on behalf of the person aggrieved within 300 days after the alleged unlawful employment practice occurred".

The Complaint in paragraph 6 alleges four separate acts of discrimination. The first, subparagraph A, alleges that Plaintiff was discharged on October 5, 1970. Thus, in regard to this subparagraph, the last act of discrimination alleged occurred on October 5, 1970. The second act of discrimination in subparagraph B involves harassment on the voyage on which Plaintiff was terminated. Since the harassment could not have occurred after his termination, the last act of discrimination could not have occurred later than October 5, 1970. Subparagraphs C and D refer to charges filed with the United States Coast Guard by Defendant. Subparagraph C refers to the incompetence of Plaintiff while subparagraph D refers to his misconduct. The charge filed by Defendant occurred on October 6, 1970. Assuming arguendo that the filing constituted an act of discrimination, the last act would have occurred on October 6, 1970.

Applying Section 706(e) to the above facts, it is clear that Plaintiff did not file his charge of discrimination within 300 days of the acts of discrimination. The last act of discrimination occurred October 6, 1970. Davidson v.

Topley, 11 FEP 573 (S.D.N.Y. 1975)*. Three hundred days from October 6, 1970, is August 1, 1971. In this case a formal charge, as evidenced by a docket number, did not occur until November 24, 1972, more than 15 months after the statutory period had expired. Even if the earlier November 19, 1971 date was used, this would be over 2-1/2 months after the statutory time expired. Obviously, if the date on which Defendant was first informed of the charge was used, this would be 17 months after the statutory time had expired. Thus, no matter what standard of measurement is used, the time for filing the charge had expired and in the instant case must be dismissed. White v. Texaco, 7 FEP 367 (S.D.N.Y. 1973); Hecht v. CARE, 351 F. Supp. 305, 310 (S.D.N.Y. 1972).

It can be anticipated that Plaintiff will contend that the statutory period was tolled by his filing of a grievance. However, even assuming that such a grievance was filed and was being processed, this would not toll the statute. Thus, the Court of Appeals for the Sixth Circuit in Guy v. Robbins and Meyers, 525 F.2d 124 (6th Cir. 1975) stated:

> In Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), the Supreme Court ruled that the adverse decision of an arbitrator could not foreclose resort by the grievant to another federal remedy. The reasoning of the Court in that opinion supports the proposition that the filing of a grievance under a collective bargaining agreement does not toll the limitation period of an applicable federal or state statute. The Court pointed out that in seeking relief under Title VII, the employee was not seeking to review an arbitrator's decision, but was asserting an independent right. In Johnson v. Railway Express Agency, Inc., 43 LW 4623 (1975), the Court held that the various remedies available to aggrieved employees are 'separate, distinct and independent.' It would be utterly inconsistent with the thesis of

* Citations to Fair Employment Practice cases (FEP) are not otherwise reported.

> these two opinions to hold that the pursuit of any of these remedies operates to toll other remedies that the employee has the right to resort to concurrently.

See also, Roberts v. Lockheed Aircraft, 11 FEP 1440 (D.C. Cal. 1975). As the Complaint was untimely filed under the Civil Rights Act of 1964, it must be dismissed.

II. The Complaint Must Be Dismissed Insofar As It Alleges A Violation Of The Civil Rights Act Of 1866.

Plaintiff alleges that jurisdiction lies in this Court. Also, by reason of the Civil Rights Act of 1866, 42 USC §1981, the facts constituting the discrimination under this law are the same as those alleged in regard to the violation of the Civil Rights Act of 1964. For the same reason, Defendant believes that the Complaint was untimely filed. As noted above, the acts of discrimination complained of ended on October 6, 1970. The Complaint in the instant case was served on Defendant on May 28, 1975, which is 4 years and 7 months after the acts of discrimination allegedly occurred.

The Civil Rights Act of 1866 does not contain a statute of limitations. Instead the parties must apply the most relevant state statute. In cases arising in New York, the 3-year statute of limitations found in §214(2) of the New York Civil Practice Law and Rules, which governs "liability created by statute" has been held applicable. Flores v. Dun & Bradstreet, 12 FEP 149 (S.D.N.Y. 1972); White v. Texaco, 7 FEP 367 (S.D.N.Y. 1973). Based on the above decisions, the Complaint is untimely filed under the Civil Rights Act of 1866 and must be dismissed.

III. The Complaint Is Barred By The Doctrine Of Res Judicata.

In the instant case, Plaintiff had filed an initial charge with the New York State Division of Human Rights

(hereafter NYSDHR). On September 17, 1971, that agency issued its opinion finding that Defendant American President Lines had not discriminated against Plaintiff by terminating him on October 5, 1970. Although Plaintiff filed an appeal, he did not pursue the matter. On December 4, 1972, the NYSDHR, in response to an inquiry, informed Plaintiff that he had exhausted the procedures under the state statute, thus making the decision of September 17, 1971, the final decision in this case. It should be noted that the NYSDHR issued its decision after several days of hearing and a transcript of 787 pages.

It is Defendant's position that the Complaint, insofar as it alleges violations of the Civil Rights Acts of 1866 and 1964, is barred by reason of the decision on the merits issued by the NYSDHR.

The principles of res judicata are fully applicable to action brought under the federal Civil Rights Act. Preiser v. Rodriques, 411 U.S. 475, 497 (1973). It has been held applicable to both the Civil Rights Acts of 1871 and 1964. Bennun v. Board of Governors, 12 FEP 1393 (D.N.J. 1976).

Defendant recognizes that the United States Court of Appeals for this Circuit has held the doctrine inapplicable to an action arising under Title VII of the Civil Rights Act of 1964. Voutsis v. Union Carbide, 452 F.2d 889 (2nd Cir. 1971). However, that case arose prior to the 1972 amendments to the Act. One of those amendments was to Section 706(b) and required that the "EEOC shall accord substantial weight to final findings and orders made by state and local authorities." While the term "substantial weight" is not defined, it is Defendant's position that the

term has the same meaning as "substantial evidence" as defined by the Supreme Court in Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). This means that the reviewing court's inquiry is limited to whether on the record below the agency could reasonably make the finding it did. Assuming that the EEOC must apply this standard, what then is the role of the court in a complaint by an employee. The answer must be the same for otherwise there would be little meaning to the statute. Thus, this Court should give substantial weight to the decision of the NYSDHR.

The EEOC, while stating in its May 23, 1973 Determination that "[s]ubstantial weight has been accorded the findings of the New York State Division of Human Rights", proceeded to ignore the state agency's decision and reached a contrary result on the merits. There is no explanation as to why the EEOC reached the result it did other than the obvious, i.e., that it ignored the findings of the state agency. In these circumstances, Defendant American President Lines asked this Court to review the record in the NYSDHR case and to accord that decision the "substantial weight" required by statute. If it does so, the instant Complaint must be dismissed.

Irrespective of whether the state agency's decision has res judicata effect in regard to an action brought under the Civil Rights Act of 1964, as amended in 1972, this Court has held the doctrine applicable to the Civil Rights Act of 1866. In Mitchell v. National Broadcasting, 13 FEP 57 (S.D.N.Y. 1976), this Court held that a black former employee whose claim that the employer discharged her because of her race was barred from thereafter suing the employer under the Civil Rights Act of 1866. For this reason, this aspect of the Complaint must be dismissed.

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IV. This Court Lacks Jurisdiction Of The Complaint Under 29 USC §151 Et. Seq.

In paragraph 1 of the Complaint, Plaintiff states that the jurisdiction of the Court is invoked "pursuant to 29 USC §151 et. seq., based on violations of the duty of fair representation owed to plaintiff". The Complaint itself consists of nine numbered paragraphs followed by a prayer for relief. Paragraph 6 is the only paragraph devoted to allegations involving Defendant American President Lines. The paragraph is divided into four lettered subparagraphs, none of which refer to any duty of fair representation. Paragraph 7 concerns itself with allegations involving Defendant MEBA and includes reference to the union's alleged failure to fairly represent Plaintiff.

Inasmuch as the Complaint does not set forth a cause of action under 29 USC §151 et. seq. insofar as Defendant American President Lines is concerned, this aspect of the Complaint must be dismissed.

CONCLUSION

For all the foregoing reasons, Defendant American President Lines, Ltd. respectfully requests this Court to grant its Motion.

Respectfully submitted,

KIRLIN, CAMPBELL & KEATING
Attorneys for Defendant
American President Lines, Ltd.

James J. Higgins,
Robert J. Hickey,
Vincent J. Lynch,
of counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ERIC E. SMITH, 790 Concourse Village West, Bronx, New York 10451, Plaintiff vs. AMERICAN PRESIDENT LINES, LTD., 29 Broadway, New York, New York 10006 and MARINE ENGINEERS BENEFICIAL ASSOCIATION, AFL-CIO, 17 Battery Place, New York, New York 10006 Defendants.	CIVIL ACTION NO. 75 Civ. 2507 JUDGE LIEBNER

COMPLAINT

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1343 (4); 42 U.S.C. §2000e et seq. and 28 U.S.C. §§2201 and 2202. This is a suit in equity authorized and instituted pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq. The jurisdiction of this Court is invoked to secure protection of and to redress deprivation of rights secured by (a) 42 U.S.C. §2000e et seq., providing for injunctive and other relief against racial discrimination in employment and (b) 42 U.S.C. § 981, providing for the equal rights of all persons in every state and territory within the jurisdiction of the United States. Jurisdiction of this Court is also invoked pursuant to 29 U.S.C. §151 et seq., based on violations of the duty of fair representation owed to plaintiff.

2. This is a proceeding for a declaratory judgment as to plaintiff's rights and for a permanent injunction, restraining defendants from maintaining a policy

practice, custom or usage of: (a) discriminating against plaintiff because of his race and color with respect to his compensation, terms, conditions and privileges of employment, and (b) failing to fairly represent the plaintiff.

3. Plaintiff Eric E. Smith is a black citizen of the United States and a resident of the State of New York. He has been represented by the Marine Engineers Beneficial Association, AFL-CIO, (hereafter, "the Union") since March 25, 1969. He was employed as a 2nd Assistant Engineer on the American President Lines' ship, the S.S. President Pierce, from approximately June 8, 1970, until October 6, 1970, when he was discharged by the Company from employment on the ship.

4. Defendant American President Lines, Ltd., is a corporation doing business in the State of New York, and the City of New York. The Defendant company owns and operates sea going vessels and is an employer within the meaning of 42 U.S.C.§ 2000e et seq.

5. Defendant Marine Engineering Beneficial Association, AFL-CIO, is a labor organization within the meaning of 42 U.S.C. §2000e et seq. in that it is engaged in an industry affecting commerce and exists, in whole or in part, for the purpose of dealing with the defendant company concerning grievances, labor disputes, wages, rates of pay, hours, and other terms or conditions of employment of the employees of the company in and around the City of New York in the State of New York. The union has approximately 2900 members and operates a hiring hall for the purpose of assisting members obtain work with shipping companies, including the defendant company.

6. The defendant American President Lines, Ltd., has engaged in the following acts, policies, practices, customs

and usages made unlawful by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., as amended, and the Civil Rights Act of 1866, 42 U.S.C. §1981:

A. Having hired the plaintiff on June 8, 1970 to work on its ship, the SS President Pierce, as a second assistant engineer, during the course of the voyage, the defendant discharged the plaintiff on October 5, 1970, for alleged incompetence. The plaintiff's discharge was on account of his race and color.

B. During the course of the voyage referred to in (A) above, the defendant, acting through its agents First Engineer Jack Donald Benjamin and Chief Engineer Irving Rinker, did harass the plaintiff on account of his race, and did subject him to abusive treatment and racial epithets on account of his race.

C. Subsequent to the voyage referred to in (A) above, the defendant filed charges of incompetence with the United States Coast Guard on account of the plaintiff's race, which charges were dismissed by the Coast Guard.

D. Subsequent to the voyage referred to in (A) above, the defendant filed charges of misconduct with the United States Coast Guard on account of the plaintiff's race, which charges were intended to result in the plaintiff's loss of Coast Guard license, thereby depriving him of future employment. These charges were dismissed by the Coast Guard.

7. The defendant Marine Engineers Beneficial Association, AFL-CIO, has engaged in the following acts, policies, practices, customs and usages made unlawful by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., as amended, the Civil Rights Act of 1866, 42 U.S.C. §1981, and its duty of fair representation owed to the plaintiff expressed by Title VII

of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., as amended, and 29 U.S.C. §151 et seq.:

A. Failure to admit the plaintiff to full and unencumbered union membership on account of his race.

B. Failure to refer the plaintiff for work through its hiring hall according to its Group I preferential list on account of his race.

C. Failure to investigate the plaintiff's grievance which he filed subsequent to his discharge the SS President Pierce on October 5, 1970.

D. Failure to process the plaintiff's grievance which he filed subsequent to his discharge from the SS President Pierce on October 5, 1970.

E. Retaliation against the plaintiff for his having filed charges or racial discrimination pursuant to Title VII of the Civil Rights Act of 1964 and pursued his remedies thereunder by currently challenging his application for membership with the union, which application has been accepted on April 25, 1969.

8. On October 14, 1970, the plaintiff filed a charge of racial discrimination against the defendants with the United States Equal Employment Opportunity Commission. The Equal Employment Opportunity Commission issued a Notice of Right To Sue to the plaintiff on May 6, 1975.

9. Plaintiff has no plain, adequate or complete remedy at law to redress the wrongs alleged herein and this suit for injunctive and other equitable relief is his only means of securing adequate relief. Plaintiff is now suffering and will continue to suffer irreparable injury from the defendants' policies, practices, acts, customs and usages as set forth herein.

WHEREFORE, plaintiff respectfully prays this Court to advance this case on the docket, order a speedy hearing at the earliest practicable date, cause this case to be in every way expedited and upon such hearing to:

1. Grant plaintiff a permanent injunction enjoining the defendants American President Lines, Ltd., and Marine Engineers Beneficial Association, AFL-CIO, their agents, successors, employees, attorneys and those acting in concert with them and at their direction from continuing to abridge the rights of the plaintiff in the manner set forth in Paragraphs 6 and 7 above;

2. Grant plaintiff declaratory and injunctive relief making him whole, by appropriate back pay and other [illegible], and restoring the plaintiff to the position he would now hold but for the defendants' illegal acts;

3. Grant to the plaintiff an award of costs and reasonable attorneys fees;

4. Grant to the plaintiff all other equitable and just relief to which he may be shown to be entitled.

James I. Meyerson

NATHANIEL R. JONES, ESQ.
WILLIAM D. WELLS, ESQ.
GEORGE E. HAIRSTON, ESQ.
JAMES I. MEYERSON, ESQ.
1790 Broadway - 10th Floor
New York, New York 10019

(212) 245-2100

ATTORNEYS FOR PLAINTIFF

VERIFICATION

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

ERIC E. SMITH, being duly sworn deposes and says that I am the Plaintiff in the foregoing Complaint, that I have read the contents of the foregoing Complaint and know them to be true to the best of my belief.

ERIC E. SMITH
790 Concourse Village West
Bronx, New York 10451
(212) 293-0027

Sworn to and subscribed before me this 27 day of May, 1975.

Notary Public

MARY D. SMITH
Notary Public, State of New York
No. 31-4517044
Qualified in New York County
Commission Expires March 30, 1976

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STATE OF NEW YORK : EXECUTIVE DEPARTMENT

STATE DIVISION OF HUMAN RIGHTS
on the complaint of

Eric Smith
Complainant,

against

American President Lines Lt'd.,
Irving Rinker, Chief Engineer &
Jack Donald Benjamin, 1st Assistant
Engineer
Respondent.

COMPLAINT NO.

I, Eric Smith

residing at Concourse Village West, Bronx, New York 10451 Tel. No. 293-0027

charge American President Lines Lt'd., Irving Rinker, Chief Engineer &
Jack Donald Benjamin, 1st Assistant Engineer

whose address is 29 Broadway, New York, New York 10004 Tel. No. 344-3260

with an unlawful discriminatory practice relating to employment on or about October 5, 1970

by denying me equal terms, condition and privileges of employment plus the termination of my employment

because of my AGE ( ), RACE (X), CREED ( ), COLOR (X), NATIONAL ORIGIN ( ), SEX ( ).

The particulars are:

1. I have been a licensed 3rd Assistant Engineer since 1967. Prior there to I worked on ships in various other classifications in the Engine Department for approximately 17 years. During this period I was a member in good standing with the National Maritime Union.

2. In the 20 years of my employment on various ships I have always preformed my duties in a satisfactory manner and I have never been fired or brought up on any charges relevant to my work performance or personal behavior.

3. On June 8th, 1970, I signed on the S. S. President Pierce, through the Union Hall, located at 752 Broadway, New York City, as a 2nd Assistant Engineer. The S. S. President is owned and operated by the American President Lines Lt'd. The captain of the ship is Capt. Bohle; the Chief Engineer is Irving Rinker and the 1st Assistant Engineer is Jack Donald Benjamin.

4. During the period June 20, 1970 through October 5, 1970, at which time I was on the S. S. President Pierce, I was mistreated and abused by the 1st Engineer, Mr. Jack Donald Benjamin, because of my race and color. I registered my complaint with the Chief Engineer, Irving Rinker, who did not correct or reprimanded Mr. Benjamin for his mistreatment of my person. At one time Mr. Benjamin told me I should be in "some where in the Cotton fields".

5. On October 5, 1970, I visited my Union Office at 752 Broadway, New York and spoke with Mr. Guido Pierangelino regarding my complaint against the named respondents. Mr. Pierangelino referred me to Mr. Castello, Union Patrolman who was assigned to cover the S. S. President Pierce.

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Complainant: Eric Smith Complaint No. .....

Respondent: American President Lines Lt'd, Irving Rinker, Chief Engineer &

Jack Donald Benjamin, 1st Assistant Engineer

6. Mr. Castello asked me to be on the ship that same day at 12 noon, at which time he would also be present and investigate my complaint.

7. At the time I spoke with Mr. Castello regarding my complaint he agreed that my charges were in order; however after he visited the ship and spoke with Mr. Rinker and Mr. Benjamin he told me that it would be better for me to drop my charges. He explained that it would be one man's word against another.

8. On October 6, 1970, Mr. Castello told me that since I had not withdrawn my charges against Mr. Benjamin, I was now being brought up on charges by Mr. Benjamin for misconduct before the United State Coast Guard Commission.

9. I am a Negro. Based on the foregoing I charge American President Lines Lt'd., Irving Rinker, Chief Engineer and Jack Donald Benjamin, 1st Assistant Engineer with discriminating against me by denying me equal terms, condition and privileges of employment plus the termination of my employment because of my race and color, in violation of the New York State Human Rights Law.

By reason of the unlawful discriminatory practice of respondent as herein alleged, complainant has already suffered damages in the sum of $...unknown.....

I have not commenced any civil, criminal or administrative action or proceeding in any court or administrative agency based upon the same grievance.

Eric E. Smith 34
(Signature of Complainant)

STATE OF NEW YORK
COUNTY OF Bronx } ss:

Alfredo Eduardo
NOTARY PUBLIC, State of New York
No. 60-0168910
Qualified in Westchester County
Commission Expires March 30, 1972

...Eric Smith....., being duly sworn, deposes and says: that he is the Complainant herein; that he has read the foregoing complaint and knows the contents thereof; that the same is true of h own knowledge except as to the matters therein stated on information and belief; and that as those matters he believes the same to be true.

Eric E. Smith
(Signature of Complainant)

Subscribed and sworn to before me
this 19th day of Oct. , 1970

STATE OF NEW YORK: EXECUTIVE DEPARTMENT
STATE DIVISION OF HUMAN RIGHTS

STATE DIVISION OF HUMAN RIGHTS on the complaint of ERIC SMITH, Complainant, - against - AMERICAN PRESIDENT LINES, LTD.; IRVING RINKER, CHIEF ENGINEER; AND JACK DONALD BENJAMIN, FIRST ASSISTANT ENGINEER, Respondents.	NOTICE OF ORDER AFTER HEARING CASE NO. C-22329-70

SIRS:

PLEASE TAKE NOTICE that the within is a true copy of an Order issued herein by Jack M. Sable, Commissioner of the State Division of Human Rights, after a hearing held before Hearing Examiner Francis X. Giaccone. In accordance with the Division's Rules of Practice, copies of this Order have been filed in the offices maintained by the Division at 270 Broadway, New York, New York 10007, and at 1022 East 163 Street, Bronx, New York 10459. The Order may be inspected by any member of the public during the regular office hours of the Division.

PLEASE TAKE FURTHER NOTICE that in accordance with Section 297-a of the New York State Human Rights Law, any party to the proceeding aggrieved by said Order of the Division may obtain review thereof in a proceeding before the State Human Rights Appeal Board, 250 Broadway, New York, New York 10007, provided such appeal is commenced by the filing with the Board of a notice of appeal within fifteen (15) days after the service of this Order.

DATED: SEP 17 1971

NEW YORK, NEW YORK

STATE DIVISION OF HUMAN RIGHTS

Jack M. Sable

JACK M. SABLE
COMMISSIONER

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STATE OF NEW YORK: EXECUTIVE DEPARTMENT
STATE DIVISION OF HUMAN RIGHTS

STATE DIVISION OF HUMAN RIGHTS on the complaint of ERIC SMITH, Complainant, - against - AMERICAN PRESIDENT LINES, LTD.; IRVING RINKER, CHIEF ENGINEER; AND JACK DONALD BENJAMIN, FIRST ASSISTANT ENGINEER, Respondents.	CASE NO. C-22329-70

PROCEEDINGS IN THE CASE

On the 14th day of October, 1970, the above-named Complainant filed a complaint with the State Division of Human Rights (hereinafter the "Division") charging the above-named Respondents with an unlawful discriminatory practice relating to employment, in violation of the Human Rights Law (Executive Law, Article 15) of the State of New York.

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondents had engaged in an unlawful discriminatory practice. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Francis X. Giaccone, a Hearing Examiner of the Division. The hearing was held on January 25, 26, 27, 28, 29, February 26, April 21, 1971.

Complainant appeared at the hearing and at the last two sessions of hearing, was represented by Abraham E. Freedman, Esq., by Ned R. Phillips, Esq., of Counsel. The Respondents appeared and were represented by Kirlin, Campbell & Keating, Esqs., by Alfred T. DeMaria, Esq., of Counsel. The Division was represented by Henry Spitz, Esq., General Counsel, by Jerome P. Vanora, Esq., and Richard M. Bronstein, Esq., of Counsel.

FINDINGS OF FACT

1. The Complainant is a Negro.

2. The American President Lines, Ltd. does business in the State of New York and hires personnel through the union in New York.

3. On June 8, 1970, Complainant was employed by Respondent American President Lines, Ltd. (hereinafter, "American") as second assistant engineer, day work. Complainant was licensed as third assistant engineer, but on a waiver by the United States Coast Guard sailed as second assistant engineer.

4. On October 5, 1970, Complainant was discharged as unskilled.

5. The Complainant was employed at the times herein pertinent on the SS President Pierce. On June 17, 1970, Respondent First Engineer Jack Donald Benjamin became his immediate supervisor. Respondent Chief Engineer Irving Rinker who was chief supervisor over both of them joined the ship on June 16, 1970.

6. Respondents Rinker and Benjamin, in their supervision of Complainant, were the employees and agents of Respondent American President Lines, Ltd.

7. Respondent Benjamin, as a member of the crew of the SS President Pierce and as supervisor of the Complainant subjected the Complainant to abusive treatment and derogatory references to the Complainant's race and color.

8. Complainant complained to Respondent Chief Engineer Rinker of the abusive treatment of the Complainant by Respondent Engineer Benjamin, and as a result the Complainant was, on June 24, 1970, placed under the immediate supervision of Respondent Chief Engineer Rinker. Complainant was no longer under the supervision of Respondent Benjamin.

9. At the conclusion of the ship's voyage, on or about October 2, 1970, Complainant asked Respondent Rinker for "coastwise leave". Respondent Rinker replied that Complainant should quit which Complainant refused to do.

10. Thereafter Respondent Rinker, did, on or about October 4, 1970, give a letter to Complainant dated October 2, 1970, informing him that Complainant was being discharged because of his lack of skill.

11. Respondent Rinker, in discharging the Complainant was not influenced by Respondent Benjamin.

12. Respondent Rinker discharged the Complainant because he came to the conclusion that Complainant was unskilled in the discharge of his duties as second engineer and in his letter of discharge, dated October 2, 1970, set forth six specifications of Complainant's lack of skill as a maintenance engineer.

13. In deciding to discharge the Complainant, Respondent Rinker was not influenced by any discrimination because of Complainant's color or race.

14. Although there is no substantial evidence that Respondents discriminated against Complainant because of his race or color insofar as it relates to the termination of Complainant's employment, I find that Respondent Benjamin discriminated against the Complainant because of his color or race in the terms, conditions and privileges of employment and that Respondent American President Lines, Ltd. is responsible for the actions of its said agent Respondent Jack Donald Benjamin.

DECISION

Based on the foregoing, I find that Respondents did not commit an unlawful discriminatory practice by discharging the Complainant.

Based on the foregoing, I find that Respondents American President Lines, Ltd. and Jack Donald Benjamin denied Complainant equal terms, conditions and privileges of employment because of Complainant's color or race, in violation of the Human Rights Law.

ORDER

Upon the basis of the foregoing Findings of Fact and pursuant to the Human Rights Law, it is hereby

ORDERED, that Respondents American President Lines, Ltd. and Jack Donald Benjamin, their agents, representatives, successors, and assigns cease and desist from discriminating against any individual in the terms, conditions and privileges of employment because of race, creed, color or national origin by the use of abusive or derogatory references during hours of employment to the race, creed, color or national origin of any employee or permitting the same or failing to control or reprimand the same or failing to take proper protective steps to prevent the same; and it is further

ORDERED, that the Respondent American President Lines, Ltd., its agents, representatives, employees, successors and assigns shall take the following affirmative action which will effectuate the purposes of the Human Rights Law:

(1) Respondent American President Lines, Ltd., shall send a notice in writing to all its supervisory employees within 30 days from the date this Order becomes effective, advising them that it has a policy of non-discrimination in employment and in not tolerating any abusive or derogatory references made by any of its employees including supervisory personnel to the race, color, creed or national origin of any other employee during hours of employment and that disciplinary action will be taken by it against any employee who violates its policy, stressing the requirement that its representatives implement such policy.

(2) Respondents shall make available to the duly-authorized representatives of the State Division of Human Rights, at reasonable times and places specified by the Division, such documents and information as may be necessary for the Division to ascertain whether there is compliance with this Order; and it is further

ORDERED, that the complaint insofar as it relates to the Respondent Irving Rinker, and insofar as it alleges an unlawful discharge of the Complainant, be and the same is hereby dismissed.

DATED: SEP 17 1971
NEW YORK, NEW YORK

STATE DIVISION OF HUMAN RIGHTS

Jack M. Sable 39
JACK M. SABLE, COMMISSIONER

STATE OF NEW YORK
Executive Department
STATE HUMAN RIGHTS APPEAL BOARD
250 Broadway 11th floor
New York, N.Y. 10007
488-2038 (area 212)

76715

RE: STATE DIVISION OF HUMAN RIGHTS ON THE COMPLAINT OF ERIC SMITH, Complainant-Appellant vs AMERICAN PRESIDENT LINES, LTD.; IRVING RINKER, CHIEF ENGINEER; AND JACK DONALD BENJAMIN, FIRST ASSISTANT ENGINEER, Respondents

Case No. C-22329-70 APPEAL NO. 1074

PLEASE TAKE NOTICE that an appeal to the State Human Rights Appeal Board has been filed in the above entitled case on September 30, 1971 by Eric Smith, Complainant-Appellant.

STATE HUMAN RIGHTS APPEAL BOARD

Dated: October 15, 1971

By J. Edward Conway
J. Edward Conway

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C. R. OF DISCRIMINATION

If you have a complaint, fill in this form and mail it to the Equal Employment Opportunity Commission's Regional Office in your area. In most cases, a charge must be filed with the EEOC within a specified time after the discriminatory act took place. IT IS THEREFORE IMPORTANT TO FILE YOUR CHARGE AS SOON AS POSSIBLE.

This form is to be used only to file a charge of discrimination based on RACE, COLOR, RELIGION, SEX, or NATIONAL ORIGIN.

Case File No. _____

(PLEASE PRINT OR TYPE)

1 Your Name (Mr. Mrs., Miss) indicate: Eric E. Smith — Phone Number 293-6027

Street Address: 790 Concourse Village West

City: Bronx — State: N.Y. — Zip Code: 10451

2 WAS THE DISCRIMINATION BECAUSE OF: (Please check one)

Race or Color ☒ Religious Creed ☐ National Origin ☐ Sex ☐

3 Who discriminated against you? Give the name and address of the employer, labor organization, employment agency and/or apprenticeship committee. If more than one, list all.

Name: American President Lines

Street address: 29 Broadway

City: New York — State: N.Y. — Zip Code: 10006

AND (other parties if any)

Have you filed this charge with a state or local government agency? Yes ☒ When 10 (MONTH) 14 (DAY) 1970 (YEAR) No ☐

If your charge is against a company or a union, how many employees or members? Under 25 ☐ Over 25 ☒

The most recent date on which this discrimination took place: Month Oct Day 6 Year 1970

Explain what unfair thing was done to you. How were other persons treated differently? (Use extra sheet if necessary.)

I was discharged from employment because of my race. Negro. I was 2nd Asst Engineer (daywork) on the SS President Pierce.

I was first employed by the company and on the SS President Pierce on June 8, 1970. During my employment I was subject to harassment because of my race from my supervisor, the 1st Asst. Engineer, Jack Donald Benjamin (a Caucasian) among others.

Mr Benjamin admitted discussing me on several occasions with Mr Irving Binker (Caucasian), the Chief Engineer who discharged me.

Mr Binker would tell me on numerous occasions how much he liked the Republic of South Africa, this too is harassment

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

Date Nov 19 1971 — Eric E. Smith (Sign your name)

Subscribed and sworn to before me this 19th day of November 1971

[illegible] (Name) — Equal Employment Officer (Title)

If it is difficult for you to get a Notary Public to sign this, sign your own name and mail to the Regional Office. The Commission will help you get the form sworn to.

U.S. BUR. OF BUDGET—No. 124-R0001

FORM EEOC-5 (REV. 7-68)

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CHARGE OF DISCRIMINATION

If you have a complaint, fill in this form and mail it to the Equal Employment Opportunity Commission's Regional Office in your area. In most cases, a charge must be filed with the EEOC within a specified time after the discriminatory act took place. IT IS THEREFORE IMPORTANT TO FILE YOUR CHARGE AS SOON AS POSSIBLE.

This form is to be used only to file a charge of discrimination based on RACE, COLOR, RELIGION, SEX, or NATIONAL ORIGIN.

(PLEASE PRINT OR TYPE)

Case File No. _____

1 Your Name (Mr., Mrs., Miss) ERIC E. SMITH Phone Number 2996637
Street Address (indicate apt.) 750 CONCOURSE VILLAGE WEST
City BRONX, NEW YORK State N. Y. Zip Code 10451

2 WAS THE DISCRIMINATION BECAUSE OF: (Please check one)
Race or Color ☒ Religious Creed ☐ National Origin ☐ Sex ☐

3 Who discriminated against you? Give the name and address of the company, labor organization, employment agency and/or apprenticeship committee. If more than one, list all.
Name AMERICAN PRESIDENT LINES INC.
Street Address 29 BROADWAY
City NEW YORK State N. Y. Zip Code 10006
AND (other parties if any) IRVING RINKER CH. ENGINEER
JACK DONALD BERGMAN 1ST ASST. ENGINEER
Union:- M.E.B.A. District 2 MEBA (NMC-CIO)

4 Have you filed this charge with a state or local government agency? Yes ☒ When 10 (MONTH) 11 (DAY) 70 (YEAR) No ☐

5 If your charge is against a company or a union, how many employees or members? Under 25 ☐ Over 25 ☒

6 The most recent date on which this discrimination took place: Month SEPT Day 19 Year 1970

7 Explain what unfair thing was done to you. How were other persons treated differently? (Use extra sheet if necessary).
Saturday Sept. 19th 1970 the Chief and 1st Asst. Engineer (Jay) Fired Asst. Engr. Jack Donald Bergman called me a nigger and numerous occasions and said I like a nigger picket on the ship and should be treated like the picket. Jack Donald Bergman also called the Benjamin a shitter. Discussions was with the chief engineer, the director for Equal opportunity at the end of the voyage on Oct. 6th 1970.
I was the only colored engineer on the ship the Sr. Executive Officer. I talked complained to the Union on Oct. 6th 1970 the Union Contacted the President of the Union Letter of Warning and signed documents that the Chief and the Asst. Engineer said I could bring both the Chief and 1st Asst. Engineer up on charges, I have proof of the

PART 2

8 I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.
Date Nov 19 1971 Eric E. Smith (Sign your name)
Subscribed and sworn to before me this 19th day of November 19 71
Charles J. Lewis (Name) Equal Employment Officer (Title)

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If it is difficult for you to get a Notary Public to sign this, sign your own name and mail to the Regional Office. The Commission will help you to get the form sworn to.

FORM APPROVED BUR OF BUDGET - No. 124 R0001

FORM EEOC-5 (REV. 7-68)

CHARGE OF DISCRIMINATION

(If you have a complaint, fill in this form and mail it to the Equal Employment Opportunity Commission's Regional Office in your area. In most cases, a charge must be filed with the EEOC within a specified time after the discriminatory act took place. IT IS THEREFORE IMPORTANT TO FILE YOUR CHARGE AS SOON AS POSSIBLE.

This form is to be used only to file a charge of discrimination based on RACE, COLOR, RELIGION, SEX, or NATIONAL ORIGIN.

Case File No. _____

(PLEASE PRINT OR TYPE)

1 Your Name (Mr., Mrs., Miss) indicate: ERIC [illegible] Phone Number [illegible]

Street Address: 120 Lexington Avenue West

City: Tarrytown State: New York Zip Code: 10591

2 WAS THE DISCRIMINATION BECAUSE OF: (Please check one)

Race or Color ☒ Religious Creed ☐ National Origin ☐ Sex ☐

3 Who discriminated against you? Give the name and address of the employer, labor organization, employment agency and/or apprenticeship committee. If more than one, list all.

Name: Operating Resident Lines

Street address: 270 Broadway

City: New York State: N.Y. Zip Code: 10006

ID (other parties if any): Irvine Kinker Sr. Engineer

Jack Donald Bentman 1st Asst. Engineer

4 Have you filed this charge with a state or local government agency? Yes ☒ When 10 (MONTH) 14 (DAY) '70 (YEAR) No ☐

5 If your charge is against a company or a union, how many employees or members? Under 25 ☐ Over 25 ☒

6 The most recent date on which this discrimination took place: Month 9 Day 12 Year 1970

7 Explain what unfair thing was done to you. How were other persons treated differently? (Use extra sheet if necessary.)

[illegible]

8 I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

Date 11-10-1971 Eric [illegible] (Sign your name)

Subscribed and sworn to before me this 19th day of November 195 1971

[illegible] (Name) Equal Employment Officer (Title)

If it is difficult for you to get a Notary Public to sign this, sign your own name and mail to the Regional Office. The Commission will help you to get the form sworn to.

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FORM APPR. BUR. OF BUDGET—No. 124-R0001 FORM EEOC-5 (REV. 7-68)

CHARGE OF DISCRIMINATION

If you have a complaint, fill in this form and mail it to the Equal Employment Opportunity Commission's Regional Office in your area. In most cases, a charge must be filed with the EEOC within a specified time after the discriminatory act took place. IT IS THEREFORE IMPORTANT TO FILE YOUR CHARGE AS SOON AS POSSIBLE.

This form is to be used only to file a charge of discrimination based on RACE, COLOR, RELIGION, SEX, or NATIONAL ORIGIN.

Case File No. TNY 20491

(PLEASE PRINT OR TYPE)

1 Your Name (Mr., ~~Mrs., Miss~~) indicate ERIC E. SMITH Phone Number 299-0087
Street Address 790 CONCOURSE VILLAGE WEST
City BRONX State N. Y. Zip Code 10451

2 WAS THE DISCRIMINATION BECAUSE OF: (Please check one)
Race or Color ☒ Religious Creed ☐ National Origin ☐ Sex ☐ (BLACK)

3 Who discriminated against you? Give the name and address of the company, labor organization, employment agency and/or apprenticeship committee. If more than one, list all.
Name AMERICAN PRESIDENT LINES INC.
Street Address 26 BROADWAY
City NEW YORK State N. Y. Zip Code
AND (other parties if any) IRVING RINKER : CHIEF ENGINEER
JACK DONALD BENJAMIN 1ST ASST. ENGINEER
J. BOHLE CAPTAIN

4 Have you filed this charge with a state or local government agency? Yes ☒ When STATE HUMAN RIGHTS COMM. OCT. 11 1970. (MONTH DAY YEAR) No ☐

5 If your charge is against a company or a union, how many employees or members? Under 25 ☐ Over 25 ☒

6 The most recent date on which this discrimination took place: Month SEPT Day 17th Year 1970 & CONT.

7 Explain what unfair thing was done to you. How were other persons treated differently? (Use extra sheet if necessary).

I JOINED THE S/S PRESIDENT PIERCE ON JUNE 8TH 1970
ON THE 4TH OF OCT. 1970 I WAS DISCHARGED ON THE
PREMISE OF INCOMPETENCE. I BELIEVE THAT I
WAS DISCRIMINATED AGAINST BECAUSE OF
MY RACE (BLACK)

E.E.O.C. RECEIVED NOV 24 1972 NEW YORK REGION OFFICE

ERIC E. SMITH

8 I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.
Date NOV. 24 1972 ERIC E. SMITH (Sign your name)
Subscribed and sworn to before me this 24th day of November 19 72
Ronald Edmundson (Name) Commissioner (Title)

If it is difficult for you to get a Notary Public to sign this, sign your own name and mail to the Regional Office. The Commission will help you to get the form sworn to.

44

FORM EEOC-5 (REV. 7-68)

- EXECUTIVE DEPARTMENT -
DIVISION OF HUMAN RIGHTS
270 BROADWAY, NEW YORK N. Y. 10007

JACK M. SABLE
COMMISSIONER

December 4, 1972

TNY2 0491

Mr. Eric E. Smith
750 Concourse Village W.
Apartment 13 F
Bronx, New York 10451

Re: Eric E. Smith vs. American President Lines, Inc.
Case No. C-22329-70

Dear Mr. Smith:

This will acknowledge receipt of your letter in the office of Commissioner Jack M. Sable on November 28, 1972.

Please be advised that, as a matter of policy, the Commissioner does not entertain requests to reopen cases which have had full benefit of a public hearing terminating in the issuance of an Order by the Commissioner. You have appealed the subject case to the Human Rights Appeal Board and thus your remedies under the Human Rights Law, short of an appeal to the courts, have been exhausted.

Sincerely,

Florence W. Lucas
Deputy Commissioner

E.E.O.C.
RECEIVED
DEC 11 1972
WASH. DIST. OFFICE

45

EQUAL EMPLOYMENT OPPORTUNITY COMMISS N
NEW YORK DISTRICT OFFICE
26 FEDERAL PLAZA, ROOM 4002
(At Foley Square)
NEW YORK, NEW YORK 10007
264 - 3840

CERTIFIED MAIL NO. 297543

March 8, 1973

President
American President Lines Inc.
26 Broadway
New York, N. Y. 10006

Charge No. TNY 2-0491

Dear Sir

Attached is a charge filed in the above-entitled case alleging a violation of Title VII of the Civil Rights Act of 1964, as amended, by your organization. Your receipt of this letter constitutes legal service of the charge.

The Charging Party has provided particular allegations in regard to the complaint enclosed herewith.

You are requested to respond to this charge and these particular allegations within ten (10) days of your receipt of this letter. You are also requested to provide information in regard to your compliance with Title VII generally, also, specifically the information requested in the enclosed Interrogatory.

All of this information is subject to the legal provisions of Sections 706(a) and 709(e) which bar making such information public prior to the institution of any proceedings under Title VII involving such information.

hen this information is received and analyzed, I will then determine if any further information is required for the determination of the facts related to this charge.

When all the facts in controversy and related to this charge are obtained, I will submit the file to the District Director, New York District Office for final determination.

If you have any questions in regard to this process, please do not hesitate to contact me at (212) 264-2498.

Thanking you for your courtesy, confidence and cooperation in this matter, I remain

Sincerely yours,

Raymond R. Dool
Investigator

cc: Charging Party
Attachment: Copy of charge
Interrogatory

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE MAY 06 1975

TO:	FROM:
Mr. Eric E. Smith 170 Concourse Village West Bronx, New York 10451	Equal Employment Opportunity Comm. New York District Office 90 Church Street, Room 1301 New York, New York 10007

THIS CHARGE HAS BEEN DISMISSED FOR THE FOLLOWING REASON:	EEOC REPRESENTATIVE	
☐ NO REASONABLE CAUSE ☐ UNTIMELY CHARGE	Ralph Munoz, District Counsel	
☐ NO JURISDICTION ☐ FAILURE TO PROCEED	TELEPHONE NUMBER 264-7161	CASE/CHARGE NUMBER TNY 2-0491

If you want to pursue your charge further, you have the right to sue the respondent(s) named in this case in the United States District Court for the area where you live. If you decide to sue, you must do so within ninety (90) days from the receipt of this Notice; otherwise your right is lost.

If you do not have a lawyer or are unable to obtain the services of a lawyer, take this Notice to the United States District Court which may, in its discretion, appoint a lawyer to represent you.

An information copy of this Notice has been sent to the respondent(s) named in this case.

If you have any questions about your legal rights or need help in filing your case in court, call the EEOC representative named above.

Hilton W. Fern

District Director

cc:

American President Lines
29 Broadway
New York, New York 10006

Marine Engineers
Beneficial Association, AFL-CIO
17 Battery Place
New York, New York 10006

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EEOC FORM APR 73 161

CHARGING PARTY'S COPY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ERIC E. SMITH, Plaintiff, v. AMERICAN PRESIDENT LINES, LTD., et al., Defendants..	CIVIL ACTION NO. 75 Civ. 2507 (CMM) STATEMENT PURSUANT TO GENERAL RULE 9(g) OF DEFENDANT AMERICAN PRESIDENT LINES, LTD.

OFFICE COPY

Pursuant to General Rule 9(g) defendant, American President Lines, Ltd. sets forth the following material facts over which there is no genuine dispute.

1. On October 14, 1970 plaintiff herein, Eric Smith, filed a charge of discrimination with the New York State Division of Human Rights (Case No. C-22329-70) based upon his discharge from employment with American President Lines, Ltd. on October 5, 1970.

2. On September 17, 1971, the New York State Division of Human Rights issued its opinion finding that plaintiff, Eric Smith, had not been discriminated against by American President Lines, Ltd. when it discharged him on October 5, 1970.

3. On September 30, 1971, plaintiff filed an appeal to the Appeal Board of the New York State Division of Human Rights (Appeal No. 1074), which was not sustained.

4. The file of the New York District Office of the Federal Equal Employment Opportunity Commission (EEOC) contains three charges identical in essence but not in wording based upon an alleged discriminatory practice by American President Lines, Ltd. in its discharge of plaintiff, Eric Smith, on October 5, 1970 which also is the basis of the complaint herein.

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5. Two of the charges filed with the EEOC were dated November 19, 1971 and the Commission's files indicate that no case file number was assigned to either of these charges. Neither of these charges was served upon defendant, American President Lines, Ltd.

6. The third charge filed with the EEOC was dated November 24, 1972 and was assigned EEOC No. TWY2-0491. Although Section 706(b) of the Civil Rights Act, 42 USC 2000e-5(b), requires that the party charged be informed within 10 days after the filing of the charge, no such notice was served upon or received by American President Lines, Ltd. within that period. The first notice of such charge was received by American President Lines, Ltd. on March 8, 1973 when the EEOC informed it of the charge in a letter requesting certain information in regard thereto.

7. On December 4, 1972, the New York State Division of Human Rights informed plaintiff that his rights under the New York Human Rights Law had been exhausted.

8. On May 6, 1975, plaintiff received a "Notice of Right to Sue" from the EEOC.

9. The complaint in this action was filed on May 28, 1975.

Dated: New York, New York
August 18, 1976

KIRLIN, CAMPBELL & KEATING

By: James J. Higgins

Attorneys for Defendant
American President Lines, Ltd.
120 Broadway
New York, New York 10005

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ERIC E. SMITH, Plaintiff, v. AMERICAN PRESIDENT LINES, LTD., et al., Defendants.	CIVIL ACTION NO. 75 Civ. 2507 (CMM)

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT AMERICAN PRESIDENT LINES' MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT, WITH ATTACHED AFFIDAVIT AND EXHIBITS IN SUPPORT OF OPPOSITION

On August 18, 1976, the defendant American President Lines, Ltd.[1] filed a Motion to Dismiss or in the Alternative for Summary Judgment. In support of its Motions, the defendant requested the Court to take judicial notice of various items from the case files of the New York State Division of Human Rights and the U.S. Equal Employment Opportunity Commission, which items are attached to its Motions. In these circumstances, where the movant supports his motion by extrinsic evidence offered to and not excluded by the Court, the motion must be treated as one for summary judgment, Rule 12(b) F.R.Civ.P., and it is in this respect that the plaintiff's memorandum is addressed.

The company advances four arguments in support of its Motions:

1. This Court lacks jurisdiction of the Complaint under the Civil Rights Act of 1964 as amended in 1972.

2. The Complaint must be dismissed insofar as it alleges a violation of the Civil Rights Act of 1866.

3. The Complaint is barred by the doctrine of res judicata.

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1. Hereafter, the American President Lines, Ltd. is referred to as "the company" or "the defendant APL." The Marine Engineers Beneficial Association is referred to as "the union" or "MEBA."

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4. This Court lacks jurisdiction of the Complaint under 29 USC §151 et seq.

The plaintiff herewith responds to each of the arguments seriatim:

I. This Court Does Have Jurisdiction of the Complaint Under the Civil Rights Act of 1964, as Amended 42 USC §2000e et seq.

Title VII of the Civil Rights Act of 1964 provides, in pertinent part:

> "A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred ... except that in a case of an unlawful employment practice with respect to which the person aggreived has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice ...., such charge shall be filed by or on behalf of the person aggreived within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, ..."
> 42 U.S.C. §2000e-5(e)

It is uncontroverted that the plaintiff was discharged from APL's employ on October 6, 1970 and filed a charge of discrimination with the appropriate State Agency on October 14, 1970. Plaintiff's Rule 9(g) Statement, Para. 1. The State agency did not terminate its proceedings until February 10, 1972, when the plaintiff withdrew his pending appeal. Affidavit of Eric Smith, Para. 12 and Attachment 14 thereto. It is further uncontroverted that the plaintiff first lodged charges of discrimination with the Equal Employment Opportunity Commission (hereafter, EEOC), on November 19, 1971, before the State agency had terminated its proceedings. Exhibit 4 attached to Defendant's

Motion to Dismiss, and Affidavit of Eric Smith, Para. 10, Attachments 9 and 10. The defendant argues that according to these bare facts, showing that the plaintiff did not file with the EEOC until more than 300 days had elapsed since his discharge, he has not fulfilled the terms of the statute quoted above and this Court is therefore without jurisdiction to consider his claim. Our reply is that the Motion cannot be disposed of on these facts alone and that consideration of the additional facts asserted in the attached Affidavit and documents attached thereto compel the conclusion that the Motion must be denied as to the Title VII claim.

In his attached Affidavit, the plaintiff fully explains the sequence of events leading up to the filing of this action. On the same day that he was discharged from APL, the company set in motion a sequence of events based upon his discharge that did not end until September 2, 1971. The company began prosecuting him in proceedings before the U.S. Coast Guard, which jeopardized his employment opportunities during their pendency and threatened to withdraw his license to work permanently. Smith Affidavit, Para. 5. These proceedings did not end until March 4 and September 2, 1971, when the Coast Guard determined that the charges of the company were groundless. Ibid. Thus, the discriminatory conduct of the company about which the plaintiff complains (Complaint, Para. 6(A-D) did not come to rest until well within the statutory filing period. In investigating and deciding his charge, the EEOC considered the company's conduct in prosecuting the plaintiff before the Coast Guard and determined that it was part and parcel of the Title VII violations which found reasonable cause to believe existed. Smith Affidavit, Para. 17 and Attachment 22.

Although the company and the union repeatedly argued to the EEOC that the charge was not timely filed, the EEOC, considering both of their courses of conduct subsequent to October 5, 1970, considered the charge as timely filed. Smith Affidavit, Para. 16, 17, and Attachments 18-22.

The union, for its part, is alleged to have engaged in a discriminatory course of conduct that did not even begin until October 5, 1970. Complaint, Para. 7(A-E). Beginning on that date and continuing until December 10, 1971, the union consistently refused to process a grievance on behalf of the plaintiff or assist him in any other way. Smith Affidavit, Para. 8 and 11, and Attachments 5, 10, and 11-13. Indeed, after this action was filed in court, the union continued to discriminate against the plaintiff by attempting to deny him full union membership. Complaint, Para. 7(E) and Smith Affidavit, Para. 19 and Attachment 25. In its determination finding cause to believe that the union had discriminatorily refused to assist the plaintiff, the EEOC stated "that Charging Party made a constructive effort to seek the assistance of Respondent Labor Organization until December 10, 1971." Smith Affidavit, Attachment 22, p. 3.

There is one additional factual matter that must be considered by the Court in ruling on the present Motion. The plaintiff states that at no time during his presence on the company's ship in 1970 and at no time during his periodic and frequent visits to his union offices - continuing to August 20, 1976 - has he seen a notice posted advising employees and union members that if they feel they have been discriminated against on account of their race or other prohibited bases, they should

file charges with the EEOC. Smith Affidavit, Para. 7. He states if he had such information available to him in October of 1970, he would have availed himself of it promptly at that time. Ibid; Title VII, of course, has always required such postings of employers and labor organizations covered by the Act. See, 42 U.S.C. §2000e-109(a) and (b), and 29 CFR 1601.27. The policy behind such postings is so strong that it is one of the few sections of the Act to provide a fine for its violation.

It has been firmly established that the statutory filing periods for presenting charges to the EEOC, while denominated as "jurisdictional" by the courts, are in reality statutes of limitations that require careful consideration of equitable factors by the courts in their application. If the plaintiff who failed to file his charge with the EEOC within the time prescribed by the statute can demonstrate valid reasons why he did not do so, and if his failure to file does not frustrate the intent of the Act or prejudice the defendant, his late filing will not deprive the Court of jurisdiction to adjudicate his Title VII claim. This issue was first raised in Antonopulos v. Aerojet-General Corp., 295 F. Supp. 1390 (E.D. Cal. 1968), where a group of plaintiffs failed to file their EEOC charges within the statutory 90-day period. The plaintiffs alleged that they did not realize that their discharge was for an illegal reason until long after the filing period, and further that the company and their union employed deceit to prevent their learning the truth. The trial court interpreted the language of the statute as directory rather than mandatory, id. at 1395,

and held that the plaintiffs would not be time-barred if their reasons for late filing were persuasive and the defendant was not prejudiced. The Court articulated the remedial purposes of Title VII which have repeatedly been relied upon for a similar result elsewhere.

> "We are not dealing with businessmen-plaintiffs or plaintiffs accustomed to consulting lawyers about their rights. This law is a remedial one, and the Congressional purpose would not be furthered by making plaintiffs of the kind with which we are concerned, members of the working class who are generally without substantial higher education, dot every 'i' and cross every 't' on their way to the courthouse. This is especially true where, as here, there may be extenuating circumstances." Ibid.

The decision in Antonopulos has been widely adopted by the circuit courts, including decisions of the Second Circuit. In Voustis v. Union Carbide Corp., 452 F.2d 889 (2nd Cir. 1971), the Court refused to dismiss the complaint of a plaintiff who had filed a charge with the EEOC "too soon", id. at 891, and then spent over two years litigating her claim at the State Division of Human Rights before returning to the EEOC. Citing Antonopulos with approval, the Court refused to apply the literal terms of the filing provisions of Title VII to achieve a "hypertechnical and overly legalistic" result. Id. at 892. In Weise v. Syracuse University, 522 F.2d 397 (2nd Cir. 1975), the Court discussed the application of Title VII's 300-day filing requirement in circumstances where the State Division of Human Rights had been utilized prior to the EEOC. The plaintiff in Weise was fired in June 1971, when Title VII did not apply to the University. She filed her first charge with the EEOC in May 1972, was refused re-hire in January 1973,

and filed an amended charge with the EEOC in June 1973. The Court refused to find her second EEOC charge untimely filed, because events which were within the 300-day filing period occurred which were interrelated with her initial charge of discrimination. In sustaining the trial court's jurisdiction to hear her claims, the Court stated, "although compliance with these requirements is a jurisdictional prerequisite to maintenance of a civil action ... the rigid insistence on meticulous observance of technicalities unrelated to any substantive purpose is inappropriate ... " Id. at 412.

In a decision last year, the Fifth Circuit addressed the question of whether the statutory time limits for filing a charge with the EEOC were strict jurisdictional requirements, depriving the courts of jurisdiction if the letter of the statute was not met, or whether they are statutes of limitations, subject to modification in equitable circumstances. In Reeb v. Economic Opportunity Atlanta, 516 F.2d 924 (5th Cir. 1975), the plaintiff had filed her EEOC charge more than 90 days after her discharge. The question presented was whether the fact alone deprived the trial court of jurisdiction or whether extenuating facts and circumstances would be applied to have her charge considered timely filed. Relying heavily upon Antonopulos, supra, and Love v. Pullman, 404 US 522 (1972) ("technicalities are particularly inappropriate in a statutorey scheme in which laymen, unassisted by trained lawyers, initiate the process.") the Court reached the conclusion that:

> "...The ninety day requirement is not 'jurisdictional' in the sense that compliance with it vel non determines the jurisdiction of the district court, without respect to any of the other circumstances in a particular case. We accept the view that the requirement should be analogized to statutes of limitations. Equitable modifications, such as tolling and stoppel, that are applied to them should also be applied here. The Act contemplates that complaints initiating EEOC proceedings will be brought

> in the first instance by laymen. It is reasonable, therefore, for courts to refuse to apply technical rules of common law pleading to charges filed initially with the Commission ... And, of course, remedial legislation such as Title VII of the Civil Rights Act of 1964 is entitled to the benefit of liberal construction." Id. at 927.

In discussing the various equitable factors which would apply in determining whether a "late" charge would be considered timely filed, the Court stated that it would consider whether the defendant was prejudiced, whether the EEOC took the case and investigated it (indicating that it was not "stale"), and whether the defendant had engaged in any conduct that would warrant his being stopped from asserting the statute of limitations as a defense. Id. at 930.

The Reeb doctrine of treating filing requirements as statutes of limitations rather than strict jurisdictional requirements has recently been adopted by the Tenth Circuit, Dartt v. Shell Oil Co., ____F.2d ____, 45 USLW 2065 (10th Cir. July 22, 1976). The Second Circuit has consistently referred to the filing requirements of Title VII as "statutes of limitations" and has applied equity factors to consider the timeliness of charges filed. See, DeMatteis v. Eastman Kodak, 511 F.2d 306 (2nd Cir. 1975), mod. 520 F.2d 409 (2nd Cir. 1975), and Egelston v. State Univ. College, __F.2d ___, No. 76-7047 (2nd. Cir. June 7, 1976). In Skoglund v. Singer Co., 12 EPD Para. 11,041 (D.C.N.H. 1975), a case arising under the age discrimination statute, 29 U.S.C. §161 et seq., the trial court there acknowledged that in appropriate circumstances, where an employer fails to post equal employment opportunity posters in violation of the statute, 29 USC §627, the filing requirements of the statute may be tolled.

In the instant case, it is clear that the plaintiff's first charge to the EEOC was timely. Both the union and the company continued their conduct against the plaintiff well into 1971. Indeed, the union continued its discriminatory conduct against the plaintiff into 1975, after the Complaint had been filed. Weise v. Syracuse University, supra, and Egelston v. State Univ. College, supra, clearly indicate that the plaintiff's charges must be considered timely filed. However, even if the defendants' discriminatory conduct toward the plaintiff had ceased altogether in October 1970, his charge of November 19, 1971 would still be timely. It is the very illegal conduct of the defendants in failing to post the notices which Title VII requires that resulted in the plaintiff's failure to proceed to the EEOC forthwith. His affidavit clearly shows that from October 1970 forward he did everything humanly possible to press him claim, in the absence of information about the EEOC. In these circumstances, it is somewhat disingenuous for the defendants to argue that the plaintiff was not diligent.

II. Portions of the Complaint Are Not Time Barred Under 42 USC §1981

The defendant company is absolutely correct in pointing out that the applicable statute of limitations for civil rights claims arising under 42 USC §1981 in New York State is N. Y. C. P. L.R. §214(2), providing a three year statute of limitations on liability based upon a statute. Romer v. Leary, 425 F.2d 186 (2nd Cir. 1970); Kaiser v. Cahn, 510 F.2d (2nd Cir. 1974);

and DeMatteis v. Eastman Kodak, 511 F.2d 306 (2nd Cir. 1975), mod. on other grounds, 520 F.2d 409 (2nd Cir. 1975).. The allegations contained in Paragraphs 6(A-D) and 7(B-D) of the Complaint are therefore time barred under the statute. However, the allegations set forth in Paragraph 7(A and E) arose in 1975 and are not time barred.

III. The Complaint Is Not Barred By the Doctrine of Res Judicata

The defendant argues that because the State Division of Human Rights found that it had discriminated against the plaintiff but not in his discharge, the doctrine of res judicata should bar his claim now. It also acknowledges that the EEOC has indicated that it has accorded substantial weight to the State findings in reaching a contrary conclusion. The flaw in the defendant's argument, as it recognizes, is that this Circuit has held that the doctrine is not to be applied in cases such as the present one. Voustis v. Union Carbide, 452 F.2d 889 (2nd Cir. 1971).

IV. This Court Retains Jurisdiction Under 29 USC §151 et seq.

As the defendant company correctly points out, albeit in a somewhat stilted manner, the allegations in the Complaint based upon a violation of the duty of fair representation relate to the defendant union's conduct, and not to the company's conduct.

CONCLUSION

For the foregoing reasons, the defendant's motion for summary judgment must be denied, except as noted herein.

Respectfully submitted,

William D. Wells, Esq.
1790 Broadway - 10th Fl.
New York, N. Y. 10019
(212) 245-2100
Co-counsel for Plaintiff

CAPTION

PLAINTIFF'S AFFIDAVIT IN
OPPOSITION TO MOTION

Filed: August 27, 1976

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

ERIC E. SMITH, being duly sworn, deposes and says that:

1. I am the named plaintiff in the above-styled cause and I am executing this Affidavit in opposition to the motion to dismiss and for summary judgment of the defendant, American President Lines, Ltd.

2. On June 8, 1970, my union, the defendant Marine Engineers Beneficial Association (MEBA) referred me to work in the position of 2nd Assistant Engineer aboard the defendant, American President Lines, Ltd.'s vessel, the S.S. President Pierce.

3. During the course of the voyage, the defendant Line's agent and employee harassed me and abused me on account of my race.

4. On October 6, 1970, the defendant company discharged me from its employment on account of my race.

5. Also on October 6, 1970, the defendant company initiated two proceedings against me with the United States Coast Guard. In the first, the company notified the Coast Guard that I was terminated for reasons of incompetence, prompting

an investigation by the Coast Guard. After investigation, the Coast Guard determined on March 4, 1971 that the charges were not substantiated. A copy of the Coast Guard Determination as received by me is attached hereto and identified as Attachment 1. In the second proceeding, the defendant company charged me with misconduct, using foul and abusive language, and disrespectful conduct before the Coast Guard. A copy of the specification of charges as received by me from the Coast Guard is attached hereto and identified as Attachment 2. On September 2, 1971, the Coast Guard Examiner determined, after a lengthy investigation and hearing, that the charges brought against me were not substantiated. A copy of the decision as received by me is attached hereto and identified as Attachment 3. As a result of the charges brought by the defendant company, substantiation of the first proceeding would have jeopardized my employment possibilities in the future, and substantiation of the second proceeding's charges would have resulted in the loss of my Coast Guard license to work in the maritime industry.

6. On October 14, 1970, I filed charges with the New York State Division of Human Rights complaining of my racial treatment on the Pierce voyage, my termination, and the failure of my union representative to assist me. A copy of this charge as filed by me is attached hereto and identified as Attachment 4.

7. At no time during my voyage on the President Pierce was there posted in any place the notification of availability of the U.S. Equal Employment Opportunity Commission to receive charges of racial discrimination in employment. In addition, I have never seen such notices posted at my union's offices, and on August 20, 1976, after my attorney showed me an example of such a poster, and went to the union's offices to determine whether such a notice was posted and found that it was not. If I had known of the existence of the U.S. Equal Employment Opportunity Commission in 1970 I would have filed charges promptly with that agency following my discharge.

8. On November 2, 1970, I wrote to a vice-president of my union and notified him of my dissatisfaction with the union's failure to represent me properly. A copy of that letter is attached hereto and identified as Attachment 5.

9. On September 17, 1971, the New York State Division of Human Rights decided that I was discriminated against by the company, but not in their discharging me. A copy of this decision is attached hereto and identified as Attachment 6.

10. On September 30, 1971, I appealed the decision of the State Division of Human Rights to the State Human Rights Appeal Board. A copy of that appeal is attached hereto and identified as Attachment 7. On October 15, 1971. the Appeal Board acknowledged receipt of my appeal. A copy of this letter

is attached hereto and identified as Attachment 8.

11. On November 19, 1971, I filed two charges with the U.S. Equal Employment Opportunity Commission. In the first, attached hereto and identified as Attachment 9, I complained about my racial harassment and discharge by the company. In the second, attached hereto and identified as Attachment 10, I named the defendant union as a Respondent and complained about the failure of the union to represent me.

12. Also in late November 1971, I attempted to obtain legal assistance from my union in handling my appeal at the State Human Rights Appeal Board. I was advised to call the union's retained attorney, Joel C. Glanstein, Esq., the present attorney for the defendant union in this action. Mr. Glanstein requested that I provide him with all of the facts and records in my case, as attested to by his letter to me of November 24, 1971, attached hereto and identified as Attachment 11. I advised Mr. Glanstein by letter that I had already supplied this information to union agents, and a copy of this letter is attached hereto and identified as Attachment 12. On December 10, 1971 Mr. Glanstein advised me in writing that he had received all of the documents I had supplied, that he declined to act as my attorney in the appeal, and that the only way that the grievance machinery of the union could be invoked would be for the Branch Agent to reccommend processing a grievance to the Area Vice Presi-

dent, who would grant or deny the request. A copy of this letter is attached hereto and identified as Attachment 13. Of course, Mr. Glanstein had already been in receipt of my letter to the area Vice President and knew that the union had refused to process my grievance. See Attachment 5.

13. Having been refused assistance by my union, and having filed charged with the Equal Employment Opportunity Commission, I notified the State Human Rights Appeal Board that I was withdrawing my appeal. A copy of this letter, dated February 10, 1972, is attached hereto and identified as Attachment 14.

14. On February 16, 1972, I furnished the EEOC with a copy of the dispositon of the Coast Guard proceedings referred to in Paragraph 5, above. The EEOC's file reflects that it was received by the agency on that date and was logged under the charge number "TNY-0491." A copy of this document is attached hereto and identified as Attachment 15.

15. On November 22, 1972, I attempted to have the State Division of Human Rights reopen my case file and initiate further proceedings. A copy of this letter is attached hereto and identified as Attachment 16. The agency refused to reopen the case, as indicated in its letter to me of December 4, 1972, attached hereto and identified as Attachment 17.

16. On November 24, 1972, I filed additional charges with the EEOC concerning my discharge from the President

Pierce. As indicated on the charge, attached hereto and identified as Attachment 18, I was complaining that the discrimination commencing with my racial harassment during the voyage was continuing to the date of the charge.

17. Throughout the EEOC'c active investigation of my case in 1973 and 1974, both the company and the union were represented by counsel and participated fully in the EEOC's investigation. This is reflected by the EEOC's case file, containing letters from the company's attornies dated May 14, 1973 and April 15, 1974, attached hereto and identified as Attachment 18 and Attachment 19, respectively, and in the correspondence between the EEOC and the union's attorney dated April 16, 1974, and April 26, 1974, attached hereto and identified as Attachment 20 and Attachment 21, respectively. In the correspondence with the EEOC identified in this paragraph, both the company and the union urged the EEOC to determine that it had no jurisdiction to process the case on the ground that the first charge filed with the agency was more than 300 days from the date of my discharge from the company. The EEOC refused to make that determination, including in its investigation the events involving the Coast Guard proceedings and union refusal to represent which occurred subsequent to October 6, 1970, the date of my discharge.

18. On May 23, 1974, the EEOC issued its determination in my case, finding "there is reasonable cause to believe Respondents violated Title VII of the Civil Rights Act of 1974, as

amended, as alleged." The EEOC based this determination upon events occurring prior to my discharge on October 6, 1970, events occurring with respect to my discharge on that date, and events concerning the Coast Guard proceedings and failure of union representation extending to December 10, 1971, three weeks after I had filed my first charge with the agency. A copy of the EEOC reasonable cause determination is attached hereto and identified as Attachment 22.

19. Also on May 23, 1974, the EEOC invited both the company and the union to participate in conciliation efforts. Both the company and the union did participate in conciliation conferences with the EEOC, as evidenced by correspondence from their attornies to the EEOC in my case file, attached hereto and identified as Attachment 23 (union's letter), and Attachment 24 (company's letter).

20. On February 5, 1975, I filed a charge of retaliation against the union with the EEOC stating that since my filing of previous charges, the union has been denying me my union book. A copy of this charge, bearing the Charge Numbers TNY 2-0491 and TNY 5-0600, is attached hereto and identified as Attachment 25.

21. On February 25, 1975 the EEOC notified the company, the union, and myself that efforts at conciliation had failed. Attached hereto and identified respectively are Attachment 26 (notice to company), Attachment 27 (notice to union), Attach-

ment 28 (notice to me), and Attachment 29 (receipt of mail delivery).

22. On May 6, 1975, the EEOC mailed to me my Notice of Right to Sue, attached hereto and identified as Attachment 30, which my attorney received on May 7, 1975.

23. On May 28, 1975, the Complaint in this case was filed. Paragraph 8 of the Complaint contains an error which this Affidavit will serve to correct. The accurate date for filing charges with the Equal Employment Opportunity Commission is November 19, 1971, rather than October 14, 1970 (the date of my charge to the New York State Division of Human Rights) as asserted.

Further affiant sayeth naught.

/S/
ERIC. E. SMITH

MEMO TO FILE

5952-79059 REC
4 March 1971

Subj: SMITH, Eric E., Z-696761, Lic. #370512; alleged incompetence on board the SS PRESIDENT PIERCE as 2nd A/E from 19 June 1970 to 5 October 1970

1. On 6 October 1970 this office was advised by the owners of the SS PRESIDENT PIERCE that the subject had been dismissed from his position as Second Assistant Engineer (Day) for reasons of incompetence.

2. Mr. Smith had been serving as Second Engineer on board the vessel from 19 June 1970 to 2 October 1970, at such time he was dismissed by the Chief Engineer.

3. An investigation revealed no substantial evidence of incompetence on the part of Mr. Smith. The dismissal of Mr. Smith appeared to be motivated by a personality clash rather than for professional reasons.

4. In view of the above, it is recommended this case be closed to file.

R. E. COLE
LTJG, USCG

OK
KN

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DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

79058 LM

IN THE MATTER OF

LICENSE NO. 370612

AND MERCHANT MARINER'S DOCUMENT ISSUED TO

Eric Smith

Z-~~SN~~ 694741

New York, N.Y.

6 October, 19 70

YOU, Eric Smith ARE HEREBY CHARGED TO APPEAR at a hearing under the provisions of R. S. 4450, as amended, (46 USC 239), -- ~~[illegible]~~ and the regulations promulgated thereunder, looking to the SUSPENSION or REVOCATION of your license/merchant mariner's document to be held at 2 P.M. M. on 16 October 19 70 at Room 503, U. S. Custom House, New York, N.Y. and to PRODUCE YOUR LICENSE/MERCHANT MARINER'S DOCUMENT at said time and place.

In the captioned matter, you are hereby charged as follows:

First CHARGE: Misconduct

FIRST SPECIFICATION: In that you, while serving as 2nd Assistant Engineer aboard SS PRESIDENT PIERCE, under authority of the captioned documents -- ~~[illegible]~~ ~~[illegible]~~, did -- ~~[illegible]~~ on or about 2 October 19 70 wrongfully fail to obey a lawful order of the First Assistant Engineer, to wit: "Follow me," while said vessel was at sea.

2ND SPEC: In that you, while serving as aforesaid did on or about 2 October 1970 wrongfully use foul and abusive language towards the First Assistant Engineer while said vessel was at sea.

3RD SPEC: In that you, while serving as aforesaid were on or about 2 October 1970 disrespectful towards the First Assistant Engineer, to wit, by spitting on the floor in a very profane manner while looking straight at the First Assistant Engineer while said vessel was at sea.

IF YOU FAIL TO APPEAR AT THE TIME AND PLACE SPECIFIED, THE HEARING MAY PROCEED IN YOUR ABSENCE AND YOU WILL FORFEIT OPPORTUNITY TO BE HEARD AND FURTHER NOTICE.

L. Miller
L. MILLER, LTJG, USCG
Investigating Officer

69 Person Charged

CG-2639 (Rev. 5-68)

Previous edition may be used.

UNITED ... OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

IN THE MATTER OF

LICENSE NO. 370612

AND MERCHANT MANNERS ... TO

ERIC SMITH

B-XX 694741

DECISION of the EXAMINER

Third CG District
New York, N. Y. 10004
2 September 19 71

CASE NO. 5952/79058

HE DOCKET NO. 03-0049-JPO'C-70

PRELIMINARY STATEMENT

Respondent in this hearing is charged with Misconducted supported by three Specifications. These Specifications allege that Respondent while serving as Second Assistant Engineer aboard the SS PRESIDENT PIERCE, while the vessel was at sea, did on or about 2 October 1970 wrongfully fail to obey a lawful order of the First Assistant Engineer, to wit: "Follow me," (First Specification); did wrongfully use foul and abusive language towards the First Assistant Engineer (Second Specification); and was disrespectful towards the First Assistant Engineer, to wit: "by spitting on the floor in a very profane manner while looking straight at the First Assistant Engineer." (Third Specification.

The first hearing in this matter was held on 16 October 1970 at which Respondent appeared with professional counsel and entered a plea of "not guilty." The hearing was continued to 19 October 1970 and then to 29 October 1970. On the latter date the hearing proceeded to conclusion.

The Investigating Officer's case consisted of two exhibits and a witness, Jack Donald Benjamin, the First Assistant Engineer of the SS PRESIDENT PIERCE.

A motion for dismissal by Respondent's counsel at the end of the Investigating Officer's case for failure to establish a "prima facie" case was denied.

The defense consisted of the sworn testimony of the Respondent and one exhibit.

After both sides had rested their case, there being no rebuttal evidence on behalf of the Coast Guard, counsel made a motion in the nature of a directed verdict of dismissal. After full and complete arguments were made by both sides, the Examiner in open hearing granted Respondent's motion and dismissed the specifications and charge with prejudice.

(Continued on Page Two)

Respondent

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PRELIMINARY STATEMENT: (cont)

Having carefully considered all of the evidence presented in this case I make the following findings:

FINDINGS OF FACT

1) Eric Smith, License No. 370612 and Merchant Mariner's Document Z-694741, was serving as Second Assistant Engineer aboard the SS PRESIDENT PIERCE, under the authority of his duly issued License and Merchant Mariner's Document on 2 October 1970 while the vessel was at sea.

2) The proof adduced by the Investigating Officer did not support upon the whole record by reliable, probative and substantial evidence the allegations of the First Specification, namely, that on 2 October 1970 the Respondent while serving as aforesaid, did wrongfully fail to obey a lawful order of the First Assistant Engineer, to wit: "Follow me."

3) The proof adduced by the Investigating Officer did not support upon the whole record by reliable, probative and substantial evidence the allegations of the Second Specification, namely, that on 2 October 1970 the Respondent, while serving as aforesaid, did wrongfully use foul and abusive language towards the First Assistant Engineer.

4) The proof adduced by the Investigating Officer did not support upon the whole record by reliable, probative and substantial evidence the allegations of the Third Specification, namely, that on 2 October 1970 the Respondent, while serving as aforesaid, was disrespectful towards the First Assistant Engineer, to wit: by spitting on the floor in a very profane manner while looking straight at the First Assistant Engineer.

In addition to the above findings with respect to ultimate facts, I make the following findings with respect to specific facts.

5) Respondent commenced his employment aboard the SS PRESIDENT PIERCE as 2nd. Assistant Engineer on 8 June 1970. He subsequently signed foreign articles for a foreign voyage which commenced on 16 June 1970 and terminated on 5 October 1970.

FINDINGS OF FACT: (cont)

6) The First Assistant Engineer and Respondent's immediate superior officer during the foreign voyage was Jack D. Benjamin. Shortly after the voyage commenced Respondent and Benjamin had disagreements over the manner in which certain jobs were to be done in the engine department. One incident occurred in June and another in September. Prior to 2 October 1970, Benjamin and Respondent were at odds with each other on these and other items. Benjamin felt Respondent was "unskilled" in the position of 2nd. Assistant Engineer and Respondent had complained to the Chief Engineer about Benjamin's hostile attitude towards him.

7) The relationship between Benjamin and Respondent was absent the usual and cooperative attitude that customarily existed aboard ship between 1st. Assistant Engineer and a 2nd. Assistant Engineer. The differences of opinions in how certain engineering jobs were to be performed constituted a conflict of personalities between these men. Although Benjamin was a white officer and Respondent was a black officer their conflict did not have racial overtones.

8) On 2 October 1970 at about 0830 hours, while the ship was at sea, Benjamin met Respondent on the main deck and advised him that some work had to be done on a gauge to a fuel oil pump. He ordered Respondent to follow him. Both men immediately proceeded to go below with Benjamin preceding Respondent. Benjamin went to the reefer deck and Respondent, under the mistaken belief that the work was to be done in the engineroom, went by another ladder to the engineroom operating platform. Benjamin subsequently met Respondent on the operating platform, had words with Respondent, and again told Respondent to follow him. This Respondent did.

9) Benjamin proceeded Respondent out of the engineroom and upon reaching the area of the ice machine, he turned around at a time when Respondent was about twenty feet away and noticed Respondent spitting on the deck. Benjamin's interpretation that such spitting by Respondent was done in a belligerent manner and directed as a disrespectful action towards him is not so interpreted by the Examiner.

10) Respondent on 6 October 1970 was properly and personally served by the Investigating Officer with the Charge of Misconduct and the three Specifications thereunder. His rights as set forth in 46 CFR 137.20-45 (a) and 46 CFR 137.20-25 (a) were explained to him.

CONCLUSIONS OF LAW

The Respondent and the subject matter of this hearing are clearly within the jurisdiction vested in the U. S. Coast Guard under Section 4450 of the Revised Statutes of the United States, as amended (46 USC 239).

The First, Second and Third Specifications are found not proved and are dismissed with prejudice.

Charge of Misconduct is not proved.

OPINION

The Investigating Officer in this contested hearing had the burden of proving the allegations of the Specifications and the evidence had to be of a reliable, probative and substantial nature, 46 CFR 137.20-77 and 46 CFR 137.20-95(b).

The Investigating Officer's proof herein of the allegations of the Specifications consisted solely of the oral testimony of the complainant, Jack D. Benjamin. His exhibit #2, the official log book entry received in evidence, is merely a written recitation by Benjamin of the substance of the allegations of the Specifications. This exhibit is not "prima facie" evidence. It was not read to Respondent nor made known to him until after the end of the voyage. Benjamin testifying in open hearing stated that on the day in question he gave an order to Respondent to follow him from the main deck to do some work on a piece of machinery. He confirmed that Respondent started to follow him but when Benjamin arrived at the reefer deck Respondent was not behind him. He found Respondent in the engineroom where he again ordered Respondent to follow him to the place where the work had to be done. Respondent complied with this order. This witness further testified that after giving the second order and as the men were proceeding topside from the operating platform that he heard Respondent call

OPINION: (cont)

him certain names. His back was to Respondent and Respondent did not address him by name. He shortly thereafter turned around and saw Respondent spit on the deck. His testimony was that Respondent's spitting was directed at him and was done in a disrespectful and profane manner.

Respondent in his sworn testimony denied that he wrongfully failed to obey any order of Benjamin; denied directing any foul and abusive language towards the 1st. Assistant Engineer, and while admitting that he did spit on the deck stated that such spitting was a natural occurrence, was made to the side and was not directed at Benjamin or intended to be anything else other than the biological act of disposing of excess saliva.

The question presented very simply was one of credibility between the testimony of Benjamin and Respondent. Both witnesses admitted that their attitude towards each other was less than cordial, that they had had differences of opinions concerning the performance of engineering duties on several occasions and that their problem had been presented to their superior, the chief engineer. It is noted that the incidents alleged in the Specifications occurred on 2 October 1970, three days before a voyage of approximately three and a-half months was to terminate. As was said by the court at page 993 in Jo[illegible]son vs. Isbrandsten Co., 190 F F.2d 991, (3rd(CIR) ([illegible]), Aff'd. 343 U.S. 779, 72 S. Ct. 1011, "Under the best of conditions many voyages result in tensed nerves and sharpened animosities." This credibility issue was resolved in Respondent's favor.

It has been found that the relationship between Benjamin and Respondent constituted a conflict of personalities and accordingly the Examiner has given greater credence to Respondent's testimony. Such testimony when balanced against the testimony of Benjamin, being the only evidence submitted by the Investigating Officer in support of the Specifications and the Charge of Misconduct, is ruled to be sufficient to rebut the "prima facie" case presented by the Investigating Officer. It was clear to the Examiner that the Investigating Officer's evidence, although prima facie, was not of such a probative, reliable and substantial nature as to overcome what has been found to be impressive testimony by Respondent.

During the hearing the issue was raised that Benjamin's attitude towards Respondent and his complaints, which were the subject of the Specifications, were motivated by racial prejudice against Respondent. Benjamin denied any such prejudice and I accept such denial on its face value. "Motives are notoriously susceptible of being misunderstood and hard to prove or disprove." N.L.R.B. v. Huston Chronicle Pub. Co. 211 F.2d 848, 854-855 (5 Cir 1954)

Respondent offered Exhibit A as documentaty evidence to show the relationship which existed between Benjamin and Respondent. Such exhibit although conceded to be hearsay as to the matters contained therein was received in evidence for that limited purpose. Such signed unsworn statement was received by the Examiner under the authority of Commandant's Appeal Decision No. 1266 but very little weight was given to this exhibit as was very little weight given to the log book entry (Exhibit #2).

In summary thereof it was clear and I therefore found, based on all of the evidence presented in this hearing, that the Investigating Officer had failed to sustain the burden of proof as required in these hearings in accordance with the regulations cited in the first paragraph of this Opinion.

Considering the entire record of this proceeding I am satisfied that the proper order was and should be one of Dismissal. Such dismissal was entered upon the record in open hearing on 29 October 1970 and is reaffirmed herein.

ORDER

That the Charge and its supporting Specifications be, and the same are hereby D I S M I S S E D.

James P. O'Connell
JAMES P. O'CONNELL
Hearing Examiner

nr

STATE OF NEW YO... : EXECUTIVE DEPARTMENT

STATE DIVISION OF HUMAN RIGHTS
on the complaint of

Eric Smith
Complainant,
against

American President Lines Lt'd.,
Irving Rinker, Chief Engineer &
Jack Donald Benjamin, 1st Assistant
Engineer
Respondent.

COMPLAINT NO.

I, Eric Smith
residing at Concourse Village West, Bronx, New York 10451 Tel. No. 293-0027
charge American President Lines Lt'd., Irving Rinker, Chief Engineer &
Jack Donald Benjamin, 1st Assistant Engineer

whose address is 29 Broadway, New York, New York 10004 Tel. No. 244-3260
with an unlawful discriminatory practice relating to employment on or about October 5, 1970
by denying me equal terms, condition and privileges of employment plus the
because of my ~~RACE~~ (~~Color~~), ~~RACE~~ ( ), ~~CREED~~ ( ), COLOR (X), NATIONAL ORIGIN ( ), SEX ( ).

The particulars are:

1. I have been a licensed 3rd Assistant Engineer since 1967. Prior there to I worked on ships in various other classifications in the Engine Department for approximately 17 years. During this period I was a member in good standing with the National Maritime Union.

2. In the 20 years of my employment on various ships I have always preformed my duties in a satisfactory manner and I have never been fired or brought up on any charges relevant to my work performance or personal behavior.

3. On June 8th, 1970, I signed on the S. S. President Pierce, through the Union Hall, located at 752 Broadway, New York City, as a 2nd Assistant Engineer. The S. S. President is owned and operated by the American President Lines Lt'd. The captain of the ship is Capt. Bohle; the Chief Engineer is Irving Rinker and the 1st Assistant Engineer is Jack Donald Benjamin.

4. During the period June 20, 1970 through October 5, 1970, at which time I was on the S. S. President Pierce, I was mistreated and abused by the 1st Engineer, Mr. Jack Donald Benjamin, because of my race and color. I registered my complaint with the Chief Engineer, Irving Rinker, who did not correct or reprimanded Mr. Benjamin for his mistreatment of my person. At one time Mr. Benjamin told me I should be "some where in the Cotton fields".

5. On October 5, 1970, I visited my Union Office at 752 Broadway, New York and spoke with Mr. Guido Pierangelino regarding my complaint against the named respondents. Mr. Pierangelino referred me to Mr. Castello, Union Patrolman who was assigned to cover the S. S. President Pierce.

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FORM E2
7-1-68-3M (783-66)

Complainant: Eric Smith Complaint No.

Respondent: American President Lines Lt'd, Irving Rinker, Chief Engineer & Jack Donald Benjamin, 1st Assistant Engineer

6. Mr. Castello asked me to be on the ship that same day at 12 noon, at which time he would also be present and investigate my complaint.

7. At the time I spoke with Mr. Castello regarding my complaint he agreed that my charges were in order; however after he visited the ship and spoke with Mr. Rinker and Mr. Benjamin he told me that it would be better for me to drop my charges. He explained that it would be one man's word against another.

8. On October 6, 1970, Mr. Castello told me that since I had not withdrawn my charges against Mr. Benjamin, I was now being brought up on charges by Mr. Benjamin for misconduct before the United State Coast Guard Commission.

9. I am a Negro. Based on the foregoing I charge American President Lines Lt'd., Irving Rinker, Chief Engineer and Jack Donald Benjamin, 1st Assistant Engineer with discriminating against me by denying me equal terms, condition and privileges of employment plus the termination of my employment because of my race and color, in violation of the New York State Human Rights Law.

By reason of the unlawful discriminatory practice of respondent as herein alleged, complainant has already suffered damages in the sum of $ unknown.

I have not commenced any civil, criminal or administrative action or proceeding in any court or administrative agency based upon the same grievance.

STATE OF NEW YORK
COUNTY OF Bronx } ss:

(Signature of Complainant)

Eric Smith, being duly sworn, deposes and says: that he is the Complainant herein; that he has read the foregoing complaint and knows the contents therof; that the same is true of his own knowledge except as to the matters therein stated on information and belief; and that as those matters he believes the same to be true.

Subscribed and sworn to before me this 14th day of Oct., 19 70

(Signature of Complainant)

Copy
ORIGINAL TO M.E.B.A.

Nov. 2 1970

Mr. J. Lamy
Vice Pres. Atlantic Coast

Dear Sir.

I was the 2 W/E aboard the S/S Pres. Pierce on voyage # 86. I found it necessary to write to you during the voyage informing you of certain incidents contrary to our constitution as it relates to discrimination. The voyage ended on Oct 5th 1970 at which time I was given a letter of dismissal by the Ch. Engineer Irving Rinker. I submitted documentary proof of the most flagrant form of prejudice and racism meted out to me during the voyage, photostatic copies of said documents was taken by Mr. Costello. There was no attempt made to have me reinstated. I was also logged for misconduct, but only after the Ch. and 1st Asst Engineer had learned that I had submitted certain documents to the M.E.B.A. as described above. The logging was so hastily written and signed that I was not given a copy of the log even read to me, I am positive that it was primarily that reason why after three hearings the U.S. Coast Guard exonerated me on all three counts of Misconduct. This writing is solely to inform you that since I got no representation from the Union I am not taking steps to protect my interest outside the Union.

Respectfully

Eric E. Smith

Received 11 8 70

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STATE OF NEW YORK: EXECUTIVE DEPARTMENT
STATE DIVISION OF HUMAN RIGHTS

STATE DIVISION OF HUMAN RIGHTS on the complaint of ERIC SMITH, Complainant, - against - AMERICAN PRESIDENT LINES, LTD.; IRVING RINKER, CHIEF ENGINEER; AND JACK DONALD BENJAMIN, FIRST ASSISTANT ENGINEER, Respondents.	NOTICE OF ORDER AFTER HEARING CASE NO. C-22329-70

SIRS:

PLEASE TAKE NOTICE that the within is a true copy of an Order issued herein by Jack M. Sable, Commissioner of the State Division of Human Rights, after a hearing held before Hearing Examiner Francis X. Giaccone. In accordance with the Division's Rules of Practice, copies of this Order have been filed in the offices maintained by the Division at 270 Broadway, New York, New York 10007, and at 1022 East 163 Street, Bronx, New York 10459. The Order may be inspected by any member of the public during the regular office hours of the Division.

PLEASE TAKE FURTHER NOTICE that in accordance with Section 297-a of the New York State Human Rights Law, any party to the proceeding aggrieved by said Order of the Division may obtain review thereof in a proceeding before the State Human Rights Appeal Board, 250 Broadway, New York, New York 10007, provided such appeal is commenced by the filing with the Board of a notice of appeal within fifteen (15) days after the service of this Order.

DATED: SEP 17 1971
NEW YORK, NEW YORK

STATE DIVISION OF HUMAN RIGHTS

Jack M. Sable
JACK M. SABLE
COMMISSIONER

TO:

Mr. Eric Smith
790 Concourse Village West
Bronx, New York

Abraham E. Freedman, Esq.
Ned Phillips, Esq., of Counsel
36 Seventh Avenue
New York, New York 10011

American President Lines, Ltd.
29 Broadway
New York, New York 10006
Att: Mr. Joseph H. Winer, Operating Manager

Mr. Irving Rinker, Chief Engineer
American President Lines, Ltd.
29 Broadway
New York, New York 10006

Mr. Jack Donald Benjamin, First Assistant Engineer
American President Lines, Ltd.
29 Broadway
New York, New York 10006

Kirlin, Campbell & Keating, Esqs.
Alfred T. DeMaria, Esq., of Counsel
120 Broadway
New York, New York 10005

Henry Spitz, Esq., General Counsel
Jerome P. Vanona, Esq., of Counsel
State Division of Human Rights
270 Broadway
New York, New York

Hon. Louis J. Lefkowitz
Attorney General
80 Centre Street
New York, New York 10013

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STATE OF NEW YORK: EXECUTIVE DEPARTMENT
STATE DIVISION OF HUMAN RIGHTS

STATE DIVISION OF HUMAN RIGHTS on the complaint of ERIC SMITH, Complainant, - against - AMERICAN PRESIDENT LINES, LTD.; IRVING RINKER, CHIEF ENGINEER; AND JACK DONALD BENJAMIN, FIRST ASSISTANT ENGINEER, Respondents.	CASE NO. C-22329-70

PROCEEDINGS IN THE CASE

On the 14th day of October, 1970, the above-named Complainant filed a complaint with the State Division of Human Rights (hereinafter the "Division") charging the above-named Respondents with an unlawful discriminatory practice relating to employment in violation of the Human Rights Law (Executive Law, Article 15) of the State of New York.

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondents had engaged in an unlawful discriminatory practice. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Francis X. Giaccone, a Hearing Examiner of the Division. The hearing was held on January 25, 26, 27, 28, 29, February 26, April 21, 1971.

Complainant appeared at the hearing and at the last two sessions of hearing, was represented by Abraham E. Freedman, Esq., by Ned R. Phillips, Esq., of Counsel. The Respondents appeared and were represented by Kirlin, Campbell & Keating, Esqs., by Alfred T. DeMaria, Esq., of Counsel. The Division was represented by Henry Spitz, Esq., General Counsel, by Jerome P. Vanora, Esq., and Richard M. Bronstein, Esq., of Counsel.

FINDINGS OF FACT

1. The Complainant is a Negro.

2. The American President Lines, Ltd. does business in the State of New York and hires personnel through the union in New York.

3. On June 8, 1970, Complainant was employed by Respondent American President Lines, Ltd. (hereinafter, "American") as second assistant engineer, day work. Complainant was licensed as third assistant engineer, but on a waiver by the United States Coast Guard sailed as second assistant engineer.

4. On October 5, 1970, Complainant was discharged as unskilled.

5. The Complainant was employed at the times herein pertinent on the SS President Pierce. On June 17, 1970, Respondent First Engineer Jack Donald Benjamin became his immediate supervisor. Respondent Chief Engineer Irving Rinker who was chief supervisor over both of them joined the ship on June 16, 1970.

6. Respondents Rinker and Benjamin, in their supervision of Complainant, were the employees and agents of Respondent American President Lines, Ltd.

7. Respondent Benjamin, as a member of the crew of the SS President Pierce and as supervisor of the Complainant subjected the Complainant to abusive treatment and derogatory references to the Complainant's race and color.

8. Complainant complained to Respondent Chief Engineer Rinker of the abusive treatment of the Complainant by Respondent Engineer Benjamin and as a result the Complainant was, on June 24, 1970, placed under the immediate supervision of Respondent Chief Engineer Rinker. Complainant was no longer under the supervision of Respondent Benjamin.

9. At the conclusion of the ship's voyage, on or about October 2, 1970, Complainant asked Respondent Rinker for "coastwise leave". Respondent Rinker replied that Complainant should quit which Complainant refused to do.

10. Thereafter Respondent Rinker, did, on or about October 4, 1970, give a letter to Complainant dated October 2, 1970, informing him that Complainant was being discharged because of his lack of skill.

11. Respondent Rinker, in discharging the Complainant was not influenced by Respondent Benjamin.

12. Respondent Rinker discharged the Complainant because he came to the conclusion that Complainant was unskilled in the discharge of his duties as second engineer and in his letter of discharge, dated October 2, 1970, set forth six specifications of Complainant's lack of skill as a maintenance engineer.

13. In deciding to discharge the Complainant, Respondent Rinker was not influenced by any discrimination because of Complainant's color or race.

14. Although there is no substantial evidence that Respondents discriminated against Complainant because of his race or color insofar as it relates to the termination of Complainant's employment, I find that Respondent Benjamin discriminated against the Complainant because of his color or race in the terms, conditions and privileges of employment and that Respondent American President Lines, Ltd. is responsible for the actions of its said agent Respondent Jack Donald Benjamin.

DECISION

Based on the foregoing, I find that Respondents did not commit an unlawful discriminatory practice by discharging the Complainant.

Based on the foregoing, I find that Respondents American President Lines, Ltd. and Jack Donald Benjamin denied Complainant equal terms, conditions and privileges of employment because of Complainant's color or race, in violation of the Human Rights Law.

ORDER

Upon the basis of the foregoing Findings of Fact and pursuant to the Human Rights Law, it is hereby

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ORDERED, that Respondents American President Lines, Ltd. and Jack Donald Benjamin, their agents, representatives, successors, and assigns cease and desist from discriminating against any individual in the terms, conditions and privileges of employment because of race, creed, color or national origin by the use of abusive or derogatory references during hours of employment to the race, creed, color or national origin of any employee or permitting the same or failing to control or reprimand the same or failing to take proper protective steps to prevent the same; and it is further

ORDERED, that the Respondent American President Lines, Ltd., its agents, representatives, employees, successors and assigns shall take the following affirmative action which will effectuate the purposes of the Human Rights Law:

(1) Respondent American President Lines, Ltd., shall send a notice in writing to all its supervisory employees within 30 days from the date this Order becomes effective, advising them that it has a policy of non-discrimination in employment and in not tolerating any abusive or derogatory references made by any of its employees including supervisory personnel to the race, color, creed or national origin of any other employee during hours of employment and that disciplinary action will be taken by it against any employee who violates its policy, stressing the requirement that its representatives implement such policy.

(2) Respondents shall make available to the duly-authorized representatives of the State Division of Human Rights, at reasonable times and places specified by the Division, such documents and information as may be necessary for the Division to ascertain whether there is compliance with this Order; and it is further

ORDERED, that the complaint insofar as it relates to the Respondent Irving Rinker, and insofar as it alleges an unlawful discharge of the Complainant, be and the same is hereby dismissed.

DATED: SEP 17 1971
NEW YORK, NEW YORK

STATE DIVISION OF HUMAN RIGHTS

JAMES H. LAROE, [illegible]

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STATE OF NEW YORK
Executive Department
STATE HUMAN RIGHTS APPEAL BOARD
250 Broadway 11th floor
New York, N.Y. 10007
488-2038 (area 212)

RE: STATE DIVISION OF HUMAN RIGHTS ON THE COMPLAINT OF ERIC SMITH, Complainant-Appellant vs AMERICAN PRESIDENT LINES, LTD.; IRVING RINKER, CHIEF ENGINEER; AND JACK DONALD BENJAMIN, FIRST ASSISTANT ENGINEER, Respondents

Case No. C-22329-70 APPEAL NO. 1074

PLEASE TAKE NOTICE that an appeal to the State Human Rights Appeal Board has been filed in the above entitled case on September 30, 1971 by Eric Smith, Complainant-Appellant.

STATE HUMAN RIGHTS APPEAL BOARD

Dated: October 15, 1971

By J. Edward Conway
Chairman

TO:

Mr. Eric Smith
790 Concourse Village West
Bronx, New York

Abraham E. Freedman, Esq.
Ned Phillips, Esq., of Counsel
36 Seventh Avenue
New York, New York 10011

American President Lines, Ltd.
29 Broadway
New York, New York 10006
Att: Mr. Joseph H. Winer, Operating Manager

Mr. Irving Rinker, Chief Engineer
American President Lines, Ltd.
29 Broadway
New York, New York 10006

Mr. Jack Donald Benjamin
First Assistant Engineer
American President Lines, Ltd.
29 Broadway
New York, New York 10006

Kirlin, Campbell & Keating, Esqs.
Alfred T. DeMaria, Esq., of Counsel
120 Broadway
New York, New York 10005

Commissioner Jack M. Sa[illegible]e
Division of Human Rig[illegible]s
270 Broadway
New York, New York

Henry Spitz, Esq., General Couns[illegible]
Division of Human Rights
270 Broadway
New York, N.Y.

Jerome P. Vanora, Esq., of Couns[illegible]
Division of Human Rights
270 Broadway
New York, N.Y.

Hon. Louis J. Lefkowitz
Attorney General
80 Centre Street
New York, N.Y.

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EXECUTIVE DEPARTMENT
STATE HUMAN RIGHTS APPEAL BOARD
250 BROADWAY
NEW YORK, NEW YORK 10007
488-2038

J. EDWARD CONWAY
CHAIRMAN

BOARD MEMBERS
LLOYD L. HURST
ALBERT S. PACETTA
IRMA VIDAL SANTAELLA

October 15, 1971

Mr. Eric Smith
790 Concourse Village West
Bronx, New York
212 293-2027

Re: State Division of Human Rights on the complaint of Eric Smith, Complainant-Appellant vs American President Lines, Ltd.; Irving Rinker, Chief Engineer; and Jack Donald Benjamin, First Assistant Engineer, Respondents
Case No. C-22329-70 APPEAL NO. 1074

Dear Sir:

This will acknowledge receipt of your appeal in the above-entitled case. In due course this matter will be considered by the Board and you will be advised of the further proceedings.

Very truly yours,

J. Edward Conway
Chairman

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CHARGE OF DISCRIMINATION

(If you have a complaint, fill in this form and mail it to the Equal Employment Opportunity Commission's Regional Office in your area. In most cases, a charge must be filed with the EEOC within a specified time after the discriminatory act took place. IT IS THEREFORE IMPORTANT TO FILE YOUR CHARGE AS SOON AS POSSIBLE.

This form is to be used only to file a charge of discrimination based on RACE, COLOR, RELIGION, SEX, or NATIONAL ORIGIN.

Case File No. _____

(PLEASE PRINT OR TYPE)

1 Your Name (Mr., Mrs., Miss) (Indicate) Eric E. Smith Phone Number 223-0907

Street Address 790 Concourse Village West

City Bronx State N.Y. Zip Code 10451

2 WAS THE DISCRIMINATION BECAUSE OF: (Please check one)

Race or Color ☒ Religious Creed ☐ National Origin ☐ Sex ☐

3 Who discriminated against you? Give the name and address of the employer, labor organization, employment agency and/or apprenticeship committee. If more than one, list all.

Name American President Lines

Street address 29 Broadway

City New York State N.Y. Zip Code 10006

AND (other parties if any)

4 Have you filed this charge with a state or local government agency? Yes ☒ When 10 (MONTH) 14 (DAY) 1970 (YEAR) No ☐

5 If your charge is against a company or a union, how many employees or members? Under 25 ☐ Over 25 ☒

6 The most recent date on which this discrimination took place: Month Oct Day 6 Year 1970

7 Explain what unfair thing was done to you. How were other persons treated differently? (Use extra sheet if necessary.)

I was discharged from employment because of my race. Negro. I was 2nd Asst Engineer (deposed) on the SS President Pierce.

I was first employed by the company and on the SS President Pierce on June 8, 1970. During my employment I was subject to harassment because of my race from my supervisor, the 1st Asst. Engineer, Jack Donald Benjamin (a Caucasian) among others.

Mr Benjamin admitted discussing me on several occasions with Mr Irving Bisbert (Caucasian), the Chief Engineer who discharged me.

Mr Bisbert would tell me on numerous occasions how much he liked the Republic of South Africa. This too is harassment.

8 I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

Date Nov 19 1971 Eric E. Smith (Sign your name)

Subscribed and sworn to before me this 19th day of November 1971

Vincent J. Doherty (Name) Equal Employment Officer (Title)

If it is difficult for you to get a Notary Public to sign this, sign your own name and mail to the Regional Office. The Commission will help you to get the form sworn to.

FORM APPR. BUR. OF BUDGET—No. 124-R0001 FORM EEOC-5 (REV. 7-68)

87

CHARGE OF DISCRIMINATION

If you have a complaint, fill in this form and mail it to the Equal Employment Opportunity Commission's Regional Office in your area. In most cases, a charge must be filed with the EEOC within a specified time after the discriminatory act took place. IT IS THEREFORE IMPORTANT TO FILE YOUR CHARGE AS SOON AS POSSIBLE.

This form is to be used only to file a charge of discrimination based on RACE, COLOR, RELIGION, SEX, or NATIONAL ORIGIN.

Case File No. _____

(PLEASE PRINT OR TYPE)

1 Your Name (Mr., Mrs., Miss) Eric E. Smith — Phone Number [illegible]
Street Address [illegible] West
City Bronx New York State N.Y. Zip Code [illegible]

2 WAS THE DISCRIMINATION BECAUSE OF: (Please check one)
Race or Color ☑ Religious Creed ☐ National Origin ☐ Sex ☐

3 Who discriminated against you? Give the name and address of the company, labor organization, employment agency and/or apprenticeship committee. If more than one, list all.
Name American President Lines Inc.
Street Address 39 Broadway
City New York State N.Y. Zip Code 10006
AND (other parties if any): Irving Kimber Ch. Engineer
Jack Donald Benjamin 1st Asst. Engineer
Union — M.E.B.A.
District 2 of the Marine Engineers Beneficial Association

4 Have you filed this charge with a state or local government agency? Yes ☑ When 10 4 70 (Month Day Year) No ☐

5 If your charge is against a company or a union, how many employees or members? Under 25 ☐ Over 25 ☑

6 The most recent date on which this discrimination took place: Month Sept Day 15 Year 1970

7 Explain what unfair thing was done to you. How were other persons treated differently? (Use extra sheet if necessary).
Initially I went with the Co. on a 6-8 to the Persian Gulf on the first Ord. Corp. Jack Benjamin called me a nigger on numerous occasions adv. said I be sure right on the ship and should be down in the bottom filthy engine room. Mr Benjamin admitted discussions were with the chief engineer, who disclosed to him in conference at the time of the incident on Oct 15th 1970.
I was the only inexperienced engineer on the ship that he [illegible] to work. I returned to the States on Oct. 15 1970 [illegible] I filed a complaint with the Office of Equal Opportunity and signed documents [illegible] the first Ch. Engineer who [illegible] Jack Benjamin [illegible] in charge of [illegible]

8 I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.
Date [illegible] (Sign your name)
Subscribed and sworn to before me this 19th day of November 19 71
[illegible] (Name) Equal Employment Officer (Title)

If it is difficult for you to get a Notary Public to sign this, sign your own name and mail to the Regional Office. The Commission will help you to get the form sworn to.

FORM APPROVED BUDGET BUREAU NO. [illegible] FORM [illegible] REV. [illegible]

88

CHARGE OF DISCRIMINATION

(If you have a complaint, fill in this form and mail it to the Equal Employment Opportunity Commission's Regional Office in your area. In most cases, a charge must be filed with the EEOC within a specified time after the discriminatory act took place. IT IS THEREFORE IMPORTANT TO FILE YOUR CHARGE AS SOON AS POSSIBLE.

This form is to be used only to file a charge of discrimination based on RACE, COLOR, RELIGION, SEX, or NATIONAL ORIGIN.

Case File No. _____

(PLEASE PRINT OR TYPE)

1 Your Name (Mr., Mrs., Miss) (Indicate) _____ Phone Number _____

Street Address _____

City _____ State _____ Zip Code _____

2 WAS THE DISCRIMINATION BECAUSE OF: (Please check one)

Race or Color ☐ Religious Creed ☐ National Origin ☐ Sex ☐

3 Who discriminated against you? Give the name and address of the employer, labor organization, employment agency and/or apprenticeship committee. If more than one, list all.

Name Lorillard Regional Office

Street address _____

City New York State N.Y. Zip Code 10001

ID (other parties if any) _____

Louis Berger as Employee

Tom Doyle Position Not Known

Have you filed this charge with a state or local government agency? Yes ☑ When 11 14 1970 (MONTH DAY YEAR) No ☐

If your charge is against a company or a union, how many employees or members? Under 25 ☐ Over 25 ☑

The most recent date on which this discrimination took place: Month 0 Day 12 Year 11/12/70

7 Explain what unfair thing was done to you. How were other persons treated differently? (Use extra sheet if necessary.)

Comments and this out to Louis the ship at Bergen when to will be made about 2 P.M. Jan. Mr. Carter came out of the 1st Q.C. Conference room. Nickel then handed me a piece of paper to read about Bergen news. Nickel then did not talk to the shop-Engineer. He came back and then went back to the shop-Engineer. Mr. Carter then left. Jan. the 12th week opinion there. I work for Louis would hire the Black there.

8 I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

Date 11-19-70 _____ (Sign your name)

Subscribed and sworn to before me this 19th day of November 1970

Vincent J. Pirotto (Name) Equal Employment Officer (Title)

If it is difficult for you to get a Notary Public to sign this, sign your own name and mail to the Regional Office. The Commission will help you to get the form sworn to.

FORM APPR. BUR. OF BUDGET—No. 124—R0001

FORM EEOC-5 (REV. 7-69)

89

/

Law Offices
Scribner, Glanstein & Klein

JOEL C. GLANSTEIN
DONALD E. KLEIN

50 Broadway
New York, N.Y. 10004
(212) 943-6148

DAVID SCRIBNER
COUNSEL

Called on 12/1/71
refused to talk to me

November 24, 1971

Mr. Eric Smith
790 Concourse Village West
Bronx, New York

Dear Mr. Smith:

I have just learned that you recently called our office, which is counsel to District No. 1-Pacific Coast District, Marine Engineers' Beneficial Association, and advised my associate that you were involved in a racial discrimination matter before the New York State Division of Human Rights.

Would you kindly indicate to me in writing as to what the facts are and what action, if any, that you desire the Union take. Upon receipt of your request I will be in a position to advise you as to whether or not the Union can assist you in this situation.

Very truly yours,

Joel C. Glanstein

JCG:jz

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1

New York N. Y.
Dec. 5th 1971

Joel C. Gladstein esq.

Dear Sir

This is in answer to your letter dated Nov. 24, 1971. I am indeed surprise that you wanted to know the facts of the case I have against American President Lines as I submitted all the documents relative to the case to Mr. Nivine of the N.E.B.A. who made photostats of same and assured me he would submit same to your office and that I would hear from you. It was after two weeks waiting for some communication from your office that I decided to call. So you can readily understand my surprise when you indicated no knowledge of the case. I would suggest that you contact above named official of the N.E.B.A. and get documents mentioned above. The appeal hearing is schedule for the 20th of Dec. at 10 A.M.

Respectfully
Eric E. Smith

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[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

December [illegible], 1971

Eric E. Smith
780 Concourse Village West
Bronx, New York 10451

Dear Mr. Smith:

Thank you for your reply of December 5, 1971 to my letter of November 24, 1971. Since I wrote you I have had an opportunity to examine the documents you left with the Federal MLEBA. The documents reviewed include copies of the following:

1) Your complaint filed with the New York State Division of Human Rights against American President Lines Ltd., Irving Rinker, Chief Engineer, SS PRESIDENT PIERCE, and Jack D. [illegible], Chief Engineer, SS PRESIDENT PIERCE.

2) Memo to file of R. E. Cole, Lt. JG, U.S. Coast Guard concerning disposition of incompetency charges filed by American President Lines with the U.S. Coast Guard.

3) Notice of Order, Proceedings, Decision and Order of Commissioner Jack M. Sable of the State Division of Human Rights, dated September 17, 1971.

4) Letter of Eric Smith to I. Lanay dated Nov. 2, 1970.

5) Letter of Dismissal to Eric Smith from Chief Engineer I. Rinker dated October 9, 1970.

6) Letter to Eric Smith from J. Edward Conway, Chairman, State Human Rights Appeal Board, dated October 15, 1971 acknowledging appeal of Commissioner Sabin's decision.

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7) Notice of appeal filed with State Human Rights Appeal Board dated October 15, 1971.

8) Transcript of deposition of Michael Seaman - March 19, [illegible].

9) Transcript of deposition of Gary Peachey - March 19, 1971.

While I sympathize with the problems with which you are faced as a result of Commissioner Dable's decision, I can only conclude from the documents before me that the Commissioner's decision will probably be sustained. Since I do not believe your appeal has merit, I must decline to act as your attorney in the appeal of this matter.

In view of the pending appeal hearing date, I urge you to contact an attorney of your choice at the earliest opportunity. If you feel that the time remaining before the appeal is to be argued is too short, you can communicate with the State Human Rights Appeal Board and ask for an adjourned hearing date because you are seeking a new attorney to represent you. I have no doubt any written request for an extension will be answered.

The only action that can be taken in situations such as yours, by counsel to District No. 1-PCD, MEBA in behalf of engineers covered by the District's collective agreements, is to pursue the grievance and arbitration machinery of the particular contract involved. The mechanism by which the grievance machinery is invoked in the District is for the Branch Agent involved to recommend processing of the grievance to the area Vice President. If the area Vice-President deems the grievance meritorious, he in turn forwards the grievance to me.

Very truly yours,

JC[illegible]

Joel C. Glanstein

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February 10, 1972

Hon. J. Edward Conway, Chairman
State Human Rights Appeal Board
250 Broadway
New York, N.Y. 10007

Re: Smith vs. American Pres. Lines
Ltd.; et al
Case No. C-22329-70
Appeal No. 1074

Dear Chairman Conway:

On advise of counsel, I have decided not to continue with the appeal in above case, but will seek redress on the Federal level.

Respectfully,

Eric E. Smith

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UNITED STATES COAST GUARD

Hearing Examiner
Room 503, Custom House
New York, N. Y. 10004

CERTIFIED - RETURN RECEIPT REQUESTED

5952/79058
3 September 1971

FEB 16 1972

Mr. Joseph Mack, Esq.
2283 Seventh Avenue
Harlem, New York 10030

Subject: In the Matter of Hearing against License No. 370612 and MMD Z-694741 issued to ERIC E. SMITH

Dear Sir:

In accordance with agreement reached in open hearing, there is herewith enclosed and served upon you as and for service upon Eric E. Smith, the original Decision, Findings and Order made and entered in the above case.

Very truly yours,

JAMES P. O'CONNELL
Hearing Examiner

Encl: (1)
Original Decision

nt

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Nov. 22, 1972

Commissioner Jack Sable
New York State Division
of Human Rights
270 Broadway
New York, N. Y. 10007

RE: Eric E. Smith vs. American President
Lines, Inc.
Case # C - 22329-70

Dear Sir:

On October 14,1970 I brought before your commission a case of probable discrimination.

After investigation and public hearings the original complaint was established, but in the decision after the order the case was dismissed.

Now, I understand that in a review of the case, a reopening of said case is possible. I have spoken to Mr. J. C. Austin of the Hempstead Branch of your Commission. I hereby respectfully request your permission to reopen the case.

Respectfully yours,

Eric E. Smith

ERIC E. SMITH
790 Goncourse Village W.
Apt. 13 F
Bronx, New York10451

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STATE OF NEW YORK
EXECUTIVE DEPARTMENT
DIVISION OF HUMAN RIGHTS
270 Broadway, New York, N. Y. 10007

JACK M. SABLE
Commissioner

December 4, 1972

TNY2 0491

Mr. Eric E. Smith
790 Concourse Village W.
Apartment 13 F
Bronx, New York 10451

Re: Eric E. Smith vs. American President Lines, Inc.
Case No. C-22329-70

Dear Mr. Smith:

This will acknowledge receipt of your letter in the office of Commissioner Jack M. Sable on November 28, 1972.

Please be advised that, as a matter of policy, the Commissioner does not entertain requests to reopen cases which have had full benefit of a public hearing terminating in the issuance of an Order by the Commissioner. You have appealed the subject case to the Human Rights Appeal Board and thus your remedies under the Human Rights Law, short of an appeal to the courts, have been exhausted.

Sincerely,

Florence V. Lucas
Deputy Commissioner

E.E.O.C.
RECEIVED
DEC 11 1972
N.Y. DIST. OFFICE

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CHARGE OF DISCRIMINATION

If you have a complaint, fill in this form and mail it to the Equal Employment Opportunity Commission's Regional Office in your area. In most cases, a charge must be filed with the EEOC within a specified time after the discriminatory act took place. IT IS THEREFORE IMPORTANT TO FILE YOUR CHARGE AS SOON AS POSSIBLE.

This form is to be used only to file a charge of discrimination based on RACE, COLOR, RELIGION, SEX, or NATIONAL ORIGIN.

Case File No. TN4 20491

(PLEASE PRINT OR TYPE)

1 Your Name (Mr., Mrs., Miss) ERIC E. SMITH Phone Number 292-6237
Street Address 790 CONCOURSE VILLAGE WEST
City BRONX State N.Y. Zip Code 10451

2 WAS THE DISCRIMINATION BECAUSE OF: (Please check one)
Race or Color ☒ Religious Creed ☐ National Origin ☐ Sex ☐ (BLACK)

3 Who discriminated against you? Give the name and address of the company, labor organization, employment agency and/or apprenticeship committee. If more than one, list all.
Name AMERICAN PRESIDENT LINES INC.
Street Address 26 BROADWAY
City NEW YORK State N.Y. Zip Code
AND (other parties if any) IRVING RINKER CHIEF ENGINEER
JACK DONALD BENJAMIN 1ST ASST. ENGINEER
J. BOHLE CAPTAIN

4 Have you filed this charge with a state or local government agency? Yes ☒ When STATE HUMAN RIGHTS COMM. OCT. 16 1970 (Month Day Year) No ☐

5 If your charge is against a company or a union, how many employees or members? Under 25 ☐ Over 25 ☒

6 The most recent date on which this discrimination took place: Month SEPT Day 17TH Year 1970 & CONT.

7 Explain what unfair thing was done to you. How were other persons treated differently? (Use extra sheet if necessary).

I JOINED THE S/S PRESIDENT PIERCE ON JUNE 8TH 1970
ON THE 4TH OF OCT. 1970 I WAS DISCHARGED ON THE
PREMISE OF INCOMPETENCE. I BELIEVE THAT I
WAS DISCRIMINATED AGAINST BECAUSE OF
MY RACE (BLACK)

E.E.O.C. RECEIVED NOV 24 1972 NEW YORK REGIONAL OFFICE

ERIC E. SMITH

8 I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.
Date Nov 24 1972 [signature] (Signature)

Subscribed and sworn to before me this 24th day of November 19 72
[signature] (Notary) [signature] (Title)

If it is difficult for you to get a Notary Public to sign this, sign your own name and mail to the Regional Office. The Commission will help you to get the form sworn to.

GPO 921-[illegible] U.S. BUREAU OF BUDGET - No. [illegible]

FORM EEOC-5 (REV. 7-63)

98

CABLEGRAMS "WAKEFIELD NEWYORK"
TELEX: 177 422219
WUI 62344
WU 12-8188

ARNOLD TULP
WILLIAM A. SHEEHAN
ELMER C. MADDY
LEO S. J. GUSMANO
WALTER P. HICKEY
JAMES B. MADDY
MARSHALL P. KEATING
RICHARD H. BROWN, JR.
JAMES J. HIGGINS
ALEXANDER E. RUGANI
THOMAS COYNE
RICHARD H. SONNER
PAUL F. MCGUIRE
ROBERT P. NARP
JOHN E. J. DOUGHERTY
WILLIAM F. FALLON
WILLIAM J. O'BRIEN
EDWARD L. SMITH
RICHARD E. REPETTO
ARTHUR J. BLANK, JR.
DAVID A. HOURSE
HENRY J. O'BRIEN
BALDWIN EINARSON
CHARLES N. FIDDLER
JAMES R. CAMPBELL
ALFRED T. DEMARIA
ROBERT L. POSTER
LAWRENCE J. SOMLES
FRANK J. GILBRIDE
JOHN R. GERAGHTY
ANTHONY P. MARSHALL

KIRLIN, CAMPBELL & KEATING
ONE TWENTY BROADWAY
NEW YORK, N.Y. 10005
212-732-5520

WASHINGTON OFFICE
THE FARRAGUT BUILDING
900 SEVENTEENTH ST., N.W.
WASHINGTON, D.C. 20006
202-296-4041

RONALD A. CAPONE
RUSSELL T. WEIL
RESIDENT PARTNERS

E. E. O. C.
RECEIVED
MAY 15 1973
N. Y. DIST. OFFICE

OUR REF. 77089

May 14, 1973

Equal Opportunity Commission
26 Federal Plaza
New York, New York

Attention: Mr. Raymond Dool

Re: Smith v. American President Lines

Dear Mr. Dool:

This letter will recapitulate the number of discussions we have had in connection with this case. In compliance with your request, we are submitting a brief summary of our position.

As you know, the complaining party filed this complaint with the New York State Human Rights Division. A full scale trial on the merits was held at which time Mr. Smith was represented by two attorneys. Both the state attorney and Mr. Smith's own private attorney, a lawyer with vast experience in maritime matters, including labor relations and discriminatory practices represented Mr. Smith. The trial took place over several days of hearings and indeed, at the request of the complainant, was adjoined at one point for depositions to be taken in California with respect to witnesses who were, in the complainant's attorney's opinion, crucial to his case. The depositions were admitted in evidence and used against the employer.

As I have thoroughly discussed the merits of the case with you, I need not refer in this letter to the fact that the testimony revealed competent evidence that Mr. Smith was guilty of approximately two dozen separate acts of negligence and/or incompetence with respect to his job duties and that he was criticized by a number of different supervisors. You are also fully aware that Mr. Smith's testimony was replete with lack of candor. He denied ever having been fired for incompetence. We produce testimony from a carrier indicating that Mr. Smith was indeed fired for an extremely gross act of negligence and flown back to New York

City from a port in the Caribbean. The negligence was so extreme that the carrier did not even wish to maintain Mr. Smith on board. Moreover, as an examination of the testimony will reveal, Mr. Smith is an extremely litigious person. He initially denied participation as a plaintiff in various suits against carriers. Only under intensive cross examination and after production of court records did Mr. Smith admit his prior litigation record. We are enclosing for your review a photostatic copy of the lengthy argument made by the undersigned in conclusion of the case, which will summarize the testimony for you. The issues were all factual in nature and decided by the Commissioner based upon the credibility of all the witnesses before him and conflicting version of the facts, including favorable crediting of the witnesses on behalf of complainant who were deposed in California. In addition, you may wish to note, that the complainant filed a grievance protesting his discharge with the union, a competent, militant and extremely aggresive seagoing union well known and highly regarded for the protection of the rights of its members including minority members. The union investigated the complaint including examination of supervisors and declined to further process the grievance based upon a strong showing on the part of the company supervisors that Mr. Smith was not a competent member of the employer's engineering crew. In all respects, we urge that substantial weight be accorded to the findings and orders made by the Human Rights Division pursuant to 42 USC §2003-5 (b). Also note that Mr. Smith filed a Notice of Appeal with the State Board but subsequently declined to follow through with the matter. The appeal was withdrawn.

Much more importantly, we request a ruling from your agency that the complaint is time barred under Sec. 706 (e) of Title VII. By any criteria the charge is time barred. More than 300 days after the alleged unlawful employment practice has elapsed and, of course, the charge with your commission was filed more than thirty days after receiving notice that the state or local agency had terminated proceedings under New York law. Mr. Smith's discharge occurred on October 5, 1970, the New York charge was filed on October 14, 1970 and the Division order was dated October 17, 1971.

Your urgent attention to this request for a ruling on the statute of limitations is requested since the employer has been put to several thousand dollars of legal expense in defending this completely unfounded charge and it is extremely unfair for the complainant, under the circumstances of this case, to continue to

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annoy the respondent and cause further expenditures of effort, energy and legal fees in defense of this matter.

Yours truly,

Alfred T. DeMaria/mk

Alfred T. DeMaria

ATD:mao

cc: Donald Kenny - APL San Francisco
Joseph Winer & John Dolan - APL New York
EEO

101

CABLEGRAMS "WASFIELD NEW YORK"
TELEX: ITT 422219
WUI 62344
WU 12-2198

KIRLIN, CAMPBELL & KEATING
ONE TWENTY BROADWAY
NEW YORK, N.Y. 10005
212-732-5520

WASHINGTON OFFICE
THE FARRAGUT BUILDING
900 CONNECTICUT ST., N.W.
WASHINGTON, D.C. 20006
202-296-4911

WILLIAM A. SHEEHAN
ELMER C. MADDY
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JAMES B. MAGNOR
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RICHARD H. BROWN, JR.
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BALDWIN EINARSON
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ALFRED T. DEMARIA
LAWRENCE J. BOWLES
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JOHN R. GERAGHTY
ANTHONY P. MARSHALL
DAVID W. MARTOWSKI
JOSEPH F. RYAN, JR.
FRANK W. STÜHLMAN

RONALD A. CARONE
RUSSELL T. WEIL
STUART S. DYE
RESIDENT PARTNERS

E.E.O.C.
RECEIVED
APR 15 1974
N.Y. DIST. OFFICE

April 15, 1974

OUR REF. 77089

Mr. Raymond Dool
Equal Employment Opportunity Commission
26 Federal Plaza
New York, New York

Smith v. A.P.L.

Dear Mr. Dool:

This letter constitutes a follow-up to our recent discussion involving Mr. Smith's charges.

Please do not lose sight of the fact that, as a matter of law, his charges are time-barred under §706(e) of Title VII.

Moreover, a full trial on the merits was conducted by the New York State Department of Human Rights which held against him. The fullest opportunity was afforded Mr. Smith to present facts on his behalf; his private attorney requested and was granted the right to have depositions taken of out of state witnesses supposedly supporting his position; the depositions were taken in California and admitted into evidence. At the hearing the employer presented competent, credible and vuluminous testimony concerning several dozen separate instances of job-related neglect.

I am enclosing a copy of our May 14, 1973 letter which more fully outlines our position. I also refer you to my summary of the evidence aduced at the trial which is contained in the trial transcript. This has already been forwarded to you under separate cover.

With regard to your most recent request for information pertaining to Caucasian employees of A.P.L. who were terminated during 1970, you should be aware of the customs and practices in the Maritime industry. Rarely, is an engineer fired from his post on a

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ship. This is considered to be out of taste and the normal Captain would never injure the reputation of an engineer by a discharge, unless it was his last resort. Accordingly, discharges rarely occur. However, during the year 1970, an Anglo-Saxon Marine engineer, Mr. Wallis Stendahl was terminated from the employment of A.P.L. for three separate instances of incompetence. This record is to be compared with Mr. Smith's more egregious conduct and incompetence as related in the trial record. Also, Mr. Smith was precipitously and ignominiously fired by another carrier during the middle of the voyage - a most unusual occurence. A copy of Mr. Stendahl's employment termination is also enclosed.

The information in this letter by no means exhausts the statements which could be made in opposition to his most recent charge. (For example, his discharge by A.P.L. was investigated by his union, MEBA, which determined that he was fired for incompetence. The evidence was so overwhelming that a grievance could not even be filed under the collective bargaining agreement). If needed, we can comment more fully and could support, in depth, our defense with extraordinarily persuasive evidence.

At this time, we are requesting that this nuisance charge be dropped, forever, and that American President Lines be allowed to conduct its' business free from the harassing nature of Mr. Smith's unfounded charges.

Yours truly,

Alfred T. DeMaria

Alfred T. DeMaria

ATD:nb
Enc.

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CERTIFIED MAIL NO. 292513

April 16, 1974

President
Scubner, Glanstein & Klein
Attn: Mr. J. C. Glanstein
50 Broadway
New York, New York 10004

Re: Smith v. District No. 1
Pacific Coast District, Marine
Engineers' Beneficial Assoc.

Dear Mr. Glanstein:

Attached is a charge filed in the above-entitled case alleging a violation of Title VII of the Civil Rights Act of 1964 by your organization. Your receipt of this letter constitutes legal service of this charge.

The Charging Party has provided particular allegations in regard to the complaint enclosed herewith.

You are requested to respond to this charge and these particular allegations within fifteen (15) days of your receipt of this letter. You are also requested to provide information in regard to your compliance with Title VII generally and, also, specifically in the area of treatment of persons like Charging Party in your employ or seeking employment with your company.

All of this information is subject to the legal provisions of Sections 706(a) and 709(e) which bar making such information public prior to the institution of any proceeding under Title VII involving such information.

No. 292513

RECEIPT FOR CERTIFIED MAIL—30¢ (plus postage)

SENT TO Pres., Scubner, Glanstein &	POSTMARK OR DATE
STREET AND NO. Klein, Attn: J. C. Glanstein, 50 Broadway	4/16/74
P.O., STATE AND ZIP CODE New York, New York 10004	TNY
RETURN RECEIPT SERVICES: 1. Signature only and date delivered ..... 15¢	
2. Date to whom, date and where delivered ..... 35¢	
DELIVER TO ADDRESSEE ONLY ..... 50¢	
SPECIAL DELIVERY (extra fee required)	

U.S. Form 3800 Apr. 1971 NO INSURANCE COVERAGE PROVIDED—NOT FOR INTERNATIONAL MAIL (See reverse side) ☆ GPO: 1972 O - 460-713

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When this information is received and analyzed, I will then determine if any further information is required for the determination of the facts relating to this charge.

If you have questions concerning these proceedings, please call me at 212-264-7186.

Very sincerely,

R. R. Dool
Investigator

Attachment

R. Dool/gg 4/16/74

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Law Offices
Markowitz and Glanstein
50 Broadway
New York, N. Y. 10004
Telephone (212) 943-6148

RICHARD H. MARKOWITZ
JOEL C. GLANSTEIN
STEVEN THALER

PHILADELPHIA, PA. OFFICE
MARKOWITZ & KIPSCHNER
TWO GIRARD PLAZA
1400 SOUTH PENN SQUARE
PHILADELPHIA, PENNSYLVANIA 19102
(215) 561-5561

April 23, 1974

Equal Employment Opportunity Commission
New York District Office
90 Church Street
Room 1301
New York, N. Y. 10007

Re: Smith v. District No. 1-Pacific Coast District,
Marine Engineers' Beneficial Association
Our File No. 300-201

Gentlemen:

This will acknowledge receipt of a copy of your letter of April 16, 1974 which enclosed a Charge filed in the above entitled case which alleged a violation of Title VII of the Civil Rights Act of 1964 by District No. 1-Pacific Coast District, MEBA.

This office is counsel to District No. 1-Pacific Coast District, MEBA, AFL-CIO with offices at 17 Battery Place, New York, N. Y.

After investigation of the specific allegations in the Charge, we hereby state in behalf of District No. 1-Pacific Coast District, MEBA that it is denied that the Union has discriminated against Eric E. Smith because of race, color, religion, creed, national origin, sex or any other reason. Mr. Smith's charges are without merit and this has been confirmed by the actions of the New York State Division of Human Rights in Case No. C-22329-70 and Appeal No. 1074 with respect to the other parties and employer named in Mr. Smith's Charge dated November 19, 1971. A copy of the decision of the New York State Human Rights Division is enclosed for your information along with a copy of the original Charge filed by Mr. Smith with the New York State Division of Human Rights.

Kindly communicate with the undersigned if we can be of further assistance in concluding this matter.

Very truly yours,

Joel C. Glanstein

Joel C. Glanstein

JCG:ac
Enc.

E. E. O. C.
RECEIVED
APR 29 1974
N. Y. DIST. OFFICE

107

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
NEW YORK DISTRICT OFFICE
90 CHURCH STREET, ROOM 1301
NEW YORK, NEW YORK 10007

CERTIFIED MAIL NO. 292738

Eric E. Smith
170 Concourse Village West
Bronx, New York 10451

Charge No. TNY 2-0491
Case No. YNY 4-389

Charging Party

vs.

American President Lines
29 Broadway
New York, New York 10006

and

Marine Engineers
Beneficial Association, AFL-CIO
17 Battery Place
New York, New York 10006

Respondents

DETERMINATION

Under the authority vested in me by Section 29 CFR 1601.19b(d) of the Commission's Procedural Regulations (September 27, 1972), I issue, on behalf of the Commission, the following Determination as to the merits of the subject charge.

Respondents are, respectively, an employer and a labor organization within the meaning of Title VII of the Civil Rights Act of 1964, as amended, and all other jurisdictional requirements have been met. Substantial weight has been accorded the findings of the New York State Division of Human Rights.

Charging Party alleges that Respondent Employer discriminated against him because of his race (Negro) by denying him equal terms and conditions of employment (subjecting him to racial epithets) and discharging him in violation of Title VII of the Civil Rights Act of 1964, as amended.

Charging Party alleges that Respondent Labor Organization failed to represent him because of his race, in violation of Title VII of the Civil Rights Act of 1964, as amended.

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The record shows that Charging Party was referred to Respondent Employer's ship, S.S. President Pierce, by Respondent Labor Organization on June 8, 1970 for the position of 2nd Assistant Engineer.

The record shows that Charging Party was hired by Respondent Employer as a 2nd Assistant Engineer under the authority of United States Coast Guard license and Mariner's documents.

Credible witness testimony establishes that Respondent Employer's 1st Assistant Engineer subjected Charging Party to abusive treatment and racial epithets.

The record shows that Charging Party complained to Respondent Employer's Chief Engineer of Charging Party's mistreatment by the 1st Assistant Engineer on or about June 24, 1970 and was removed from under the direct supervision of the 1st Assistant Engineer. The Chief Engineer assumed direct supervision of the Charging Party.

The record fails to show evidence that the 1st Assistant Engineer was in any way disciplined for his treatment of Charging Party.

The record shows evidence that on or about October 1, 1970 Charging Party requested "coast wise leave" from Respondent Employer's Chief Engineer. The Chief Engineer, rather than grant the leave, informed the Charging Party that he should quit. Charging Party refused to do so.

The record shows that, though not under his immediate supervision and lacking evidence of an emergency, the 1st Assistant Engineer ordered the Charging Party to follow him to the engineroom on October 2, 1970. The record shows that following this order, a series of incidents occured, culminating in Charging Party being charged by the 1st Assistant Engineer with failing to obey a lawful order, wrongful use of foul and abusive language and being disrespectful to a superior officer on that day.

The record shows that the charges were duly recorded in the Ship Log and forwarded to the United States Coast Guard for investigation.

The record shows evidence that Charging Party was discharged by Respondent Employer's Chief Engineer for "lack of skills" on October 6, 1970.

The record shows that, after investigation, the United States Coast Guard found the charges against the Charging Party were not proved and the charge and supporting specifications were dismissed. The Coast Guard further found that Charging Party was dismissed due to a "personality clash" rather than for "professional reasons."

The record shows that Charging Party filed a grievance with Respondent Labor Organization on October 6, 1970 and that Respondent Labor Organization's "Patrolman" visited the ship in response to the grievance.

From the record it appears Respondent Labor Organization's "Patrolman" spoke only to Respondent Employer's Chief Engineer and 1st Assistant Engineer, both of whom Charging Party charged with racial discrimination. It also appears that Charging Party was advised by the "Patrolman" to drop his charge"because it would be one man's word against another."

The record shows that Charging Party made a constructive effort to seek the assistance of Respondent Labor Organization until December 10, 1971. On that date, Respondent Labor Organization's counsel informed Charging Party that his case was without merit and declined to act on his behalf.

The record shows that Negroes represent approximately 02.8% of Respondent Labor Organization's approximately 2900 members.

Based on the foregoing, I conclude there is reasonable cause to believe Respondents violated Title VII of the Civil Rights Act of 1964, as amended, as alleged.

Having determined that there is reasonable cause to believe Title VII was violated, the Commission now invites the parties to join with it in a collective effort towards a just resolution of this matter. A "Notice of Conciliation Process" is enclosed for your information. A representative of this office will be in contact with each party in the near future to begin the conciliation process.

FOR THE COMMISSION:

May 23, 1974
Date

Freddie D. Holt
Freddie D. Holt
Acting District Director

Enclosure

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
NEW YORK DISTRICT OFFICE
90 Church St., Rm. 1301

NEW YORK, NEW YORK 10007
264-7161

EXPLANATION OF JUDICIAL REVIEW

Under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e) et seq., as amended, the charging party has the right, to request judicial review of the Commission's processes, under the following circumstances:

1. After the Commission has administratively closed the case for lack of jurisdiction untimely filing or for any other reason.

2. After the Commission has determined that there is no reasonable cause to believe that the alleged violations are true, and has dismissed the charge.

3. After the Commission has determined that there is reasonable cause to believe that the allegations are true, but is unable to affect a voluntary conciliation between the parties.

4. Anytime after 180 days (240 days if the complaint has been deferred to a state or local agency) have elapsed since the charge was formally filed with the Commission, whether or not any of the first three situations, outlined above, exist.

In order to initiate judicial review the charging party must request, in writing, within a reasonable time, that the Commission issue a "Notice of Right to Sue." he receipt of this "Notice of Right to Sue" is the initial step by which the charging party may commence a civil action in federal district court.

If you need any further information, contact Ralph Munoz, District Counsel of this office at (212) 264-7188.

Law Offices
Markowitz and Glanstein
50 Broadway
New York, N. Y. 10004
Telephone (212) 943-6148

RICHARD H. MARKOWITZ
JOEL C. GLANSTEIN
STEVEN THALER

PHILADELPHIA, PA. OFFICE
MARKOWITZ & KIRSCHNER
TWO GIRARD PLAZA
1400 SOUTH PENN SQUARE
PHILADELPHIA, PENNSYLVANIA 19102
(215) 561-5561

June 10, 1974

E. E. O. C.
RECEIVED
JUN 11 1974
N. Y. DIST. OFFICE

Freddie D. Holt
Acting District Director
Equal Employment Opportunity Commission
90 Church Street
Room 1301
New York, N. Y. 10007

Re: Charge No. TNY 2-0481
Case No. YNY 4-389
Charging Party - Eric Smith
Our File No. 300-204

Dear Mr. Holt:

We are in receipt of a copy of your Determination dated May 23, 1974 wherein you find there is reasonable cause to believe Title VII was violated with respect to the charges alleged by the above named individual.

While we disagree with your Determination insofar as it relates to the Marine Engineers Beneficial Association we are prepared to participate in a conciliation effort. I am enclosing a copy of your form EEOC 153 indicating the willingness of this office to participate in settlement discussions, without prejudice, in behalf of the Marine Engineers Beneficial Association.

Very truly yours,

Joel C. Glanstein

Joel C. Glanstein

JCG:jz
Encl.

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

INVITATION TO PARTICIPATE IN SETTLEMENT DISCUSSIONS

Section 706(b) of Title VII, Civil Rights Act of 1964, as amended, requires that when the Commission determines there is a reasonable cause to believe the charge is true, it shall endeavor to eliminate the alleged unlawful employment practice by informal methods of conference, conciliations, and persuasion. This invitation is being issued to both parties to determine their willingness to engage in such settlement discussions. If either party declines discussion, or the Commission is unable to secure an acceptable settlement, the District Director shall inform both parties, in writing, of alternatives for obtaining relief available to the Charging Party(ies) and the Commission.

Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned.

DATE	CHARGE NUMBER
May 23, 1974	TNY 2-0491

PLEASE COMPLETE THE FOLLOWING INFORMATION AND RETURN TO EEOC IN ATTACHED SELF-ADDRESSED ENVELOPE

TO:	FROM: *(Name and address of charging party or respondent)*
Equal Employment Opportunity Comm. New York District Office 90 Church Street, Room 1301 New York, New York 10007	Marine Engineers Beneficial Association, AFL-CIO 17 Battery Place New York, New York 10006

I ☒ WILL ☐ WILL NOT ENGAGE IN SETTLEMENT DISCUSSIONS.

SUGGESTED

DATE	TIME

LOCATION

COMMENTS

E.E.O.C. RECEIVED JUN 11 1974 N.Y. DIST. OFFICE

DATE	TELEPHONE NUMBER WHERE SIGNEE CAN BE REACHED
June 10, 1974	(212) 943-5148
TYPED NAME OF CHARGING PARTY / RESPONDENT	SIGNATURE
Marine Engineers Beneficial Association	Joel C. Gaventa, Counsel

EEOC FORM DEC 72 153

114

CABLEGRAMS "VASEFIELD NEWYORK"
TELEX: ITT 422219
WUI 62344
WU 12-8195

WILLIAM A. SHEEHAN
ELMER C. MADDY
LOUIS J. PUSHKARO
WALTER P. HICKEY
JAMES B. MAGNOR
MARSHALL P. KEATING
RICHARD H. BROWN, JR.
JAMES J. HIGGINS
ALEXANDER E. RUGANI
RICHARD H. SOMMER
THOMAS COYNE
PAUL F. McGUIRE
ROBERT P. HART
DANIEL J. DOUGHERTY
WILLIAM F. FALLON
WILLIAM J. O'BRIEN
EDWARD L. SMITH
DAVID A. NOURSE
HENRY J. O'BRIEN
BALDVIN EINARSON
CHARLES N. FIDDLER
JAMES R. CAMPBELL
ALFRED T. DEMARIA
LAWRENCE J. BOWLES
FRANK J. GILBRIDE
JOHN R. GERAGHTY
ANTHONY P. MARSHALL
DAVID W. MARTOWSKI
JOSEPH F. RYAN, JR.
FRANK W. STUHLMAN

KIRLIN, CAMPBELL & KEATING
ONE TWENTY BROADWAY
NEW YORK, N.Y. 10005
212-732-5520

WASHINGTON OFFICE
THE FARRAGUT BUILDING
900 SEVENTEENTH ST., N.W.
WASHINGTON, D.C. 20006
202-296-4911

RONALD A. CAPONE
RUSSELL T. WEIL
STUART S. DYE
RESIDENT PARTNERS

August 1, 1974

OUR REF. 80070

Mr. Freddie D. Holt
Acting District Director
Equal Employment Opportunity Commission
90 Church Street - Room 1301
New York, N.Y. 10007

Re: Eric Smith Charge
Charge No. TNY 2-0491
Case No. TNY 4-389

Dear Mr. Holt:

I understand that this matter has been set up for conciliation. As you may know, we are willing to participate in conciliation proceedings without prejudice to our client's rights. Prior to setting a date for discussion on this issue, please contact me so that a mutually convenient date may be agreed to.

Yours truly,

Alfred T. DeMaria

ATD/jm
cc:J.D.Kenny

E.E.O.C.
RECEIVED
AUG 02 1974
N.Y. DIST. OFFICE

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(PLEASE PRINT OR TYPE) RETALIATION

CHARGE OF DISCRIMINATION	CASE NO. TNY2-0491	EEOC NO. 124-[illegible]

INSTRUCTIONS

If you have a complaint, fill in this form and mail it to the Equal Employment Opportunity Commission's District Office in your area. In most areas, a charge may be filed with the EEOC within a specified time after the discriminatory act took place. IT IS VERY IMPORTANT TO FILE YOUR CHARGE AS QUICKLY AS POSSIBLE. (Attach extra sheets of paper if necessary.)

CAUSE OF DISCRIMINATION

- ☐ RACE OR COLOR
- ☐ SEX
- ☐ RELIGIOUS CREED
- ☐ NATIONAL ORIGIN
- ☒ RETALIATION

NAME (Indicate Mr. or Mrs.) ERIC SMITH	DATE OF BIRTH 9-18-11
STREET ADDRESS 710 CONCOURSE VILLAGE WEST / COUNTY	SOCIAL SECURITY NO. 067-03-0552
CITY, STATE, AND ZIP CODE BRONX, N.Y. 10451	TELEPHONE NO. (Include area code) 293-0027

THE FOLLOWING PERSON ALWAYS KNOWS WHERE TO CONTACT ME

NAME (Indicate Mr. or Mrs.)	TELEPHONE NO. (Include area code)
STREET ADDRESS	CITY, STATE, AND ZIP CODE

LIST THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT WHO DISCRIMINATED AGAINST YOU (If more than one, list all)

NAME MARINE ENGINEERS BENEVOLENT ASSOC.	TELEPHONE NO. (Include area code) 425-7280
STREET ADDRESS 17 BATTERY PLACE	CITY, STATE, AND ZIP CODE N.Y. N.Y.

OTHERS WHO DISCRIMINATED AGAINST YOU (If any): MR. FRANK LOREDO INVST. COMMITTEE

CHARGE FILED WITH STATE/LOCAL GOV'T. AGENCY	DATE FILED	AGENCY CHARGE FILED WITH (Name and address)
☒ YES ☐ NO	11-70	N.Y.S.C.H.R.

APPROXIMATE NO. OF EMPLOYEES/MEMBERS OF COMPANY OR UNION THIS CHARGE IS FILED AGAINST	DATE MOST RECENT OR CONTINUING DISCRIMINATION TOOK PLACE (Month, day, and year)
over 15	4-25-69 & CONTINUING

Explain what unfair thing was done to you and how other persons were treated differently. Understanding that this statement is for the use of the United States Equal Employment Opportunity Commission, I hereby certify:

I feel that the MEBA is retaliating against me because of my previous Charge against them for racial discrimination. I have been continually denied my Union Book I feel because of my previous Charge against them. See original Charge TNY2-0491

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

DATE	CHARGING PARTY (Signature)
4/4/75	Eric E. Smith

I declare under penalty of perjury that the foregoing is true and correct.

DATE	SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (Day, month, and year)
4/4/75	[illegible]

NOTARY PUBLIC

SIGNATURE (It is difficult for you to get a Notary Public to join with you in your complaint to the District Office. The Commission will notarize the charge for you at a later time.)

EEOC Form 5 Previous editions of this form are obsolete. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

TNY2-0600

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FEB 25 1975

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

American President Lines
29 Broadway
New York, New York 10006

Re: Eric Smith vs. American President Lines
Charge No. TNY 2-0491

Dear Sir or Madam:

This will confirm the results of our conciliation efforts on the above-referenced case. The Commission considers its efforts at conciliation of this matter have failed.

We shall continue to process this case in accordance with Commission procedures. You will be advised of further developments as they occur.

Very truly yours,

AWS

Arthur W. Stern
District Director

cc:
base file
reading file

EEOC:RMunoz:ph 2/21/75

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FEB 25 1975

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Marine Engineers
Beneficial Association, AFL-CIO
17 Battery Place
New York, New York 10006

Re: Eric Smith vs. Marine Engineers,
Beneficial Association, AFL-CIO
Charge No. TNY 2-0491

Dear Sir or Madam:

This will confirm the results of our conciliation efforts on the above-referenced case. The Commission considers its efforts at conciliation of this matter have failed.

We shall continue to process this case in accordance with Commission procedures. You will be advised of further developments as they occur.

Very truly yours,

AWS

Arthur W. Stern
District Director

cc:
base file
reading file

EEOC:RMunoz:ph 2/21/75

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CERTIFIED MAIL
RETURN RECEIPT REQUESTED

FEB 25 1975

Mr. Eric E. Smith
170 Concourse Village West
Bronx, New York 10451

Re: Smith vs. American President Lines &
Marine Engineers, Beneficial Assoc.
Charge No. TNY 2-0491

Dear Mr. Smith:

This will confirm the results of our conciliation efforts on the above-referenced case. The Commission considers its efforts at conciliation of this matter have failed.

EEOC Procedural Regulation 29 C.F.R. 1601.25 states the procedure to be followed after failure of conciliation and requires that such notification to an aggrieved person shall include:

a) A copy of the charge.
b) A copy of the Commission's determination.
c) Advise concerning right to proceed in Court under Section 706(e) of Title VII.

These required documents are herein enclosed. We shall continue to process this case in accordance with Commission procedures. You will be advised of further developments as they occur.

Very truly yours,

Arthur W. Stern
District Director

Enclosures:
As stated above.

cc:
base file
reading file

EEOC:RMunoz:ph 2/21/75

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SENDER: Be sure to follow instructions on other side

PLEASE FURNISH SERVICE(S) INDICATED BY CHECKED BLOCK(S)
(Additional charges required for these services)

☐ Show address where delivered ☐ Deliver ONLY to addressee

RECEIPT
Received the numbered article described below

REGISTERED NO.
CERTIFIED NO. 777092
INSURED NO.
DATE DELIVERED MAR 5 1975

SIGNATURE OR NAME OF ADDRESSEE (Must always be filled in)
1. Mr. Eric E. Smith
SIGNATURE OF ADDRESSEE'S AGENT, IF ANY
2. Eric E. Smith
SHOW WHERE DELIVERED (Only if requested, and include ZIP Code)
3.

SENDER: Be sure to follow instructions on other side

PLEASE FURNISH SERVICE(S) INDICATED BY CHECKED BLOCK(S)
(Additional charges required for these services)

☐ Show address where delivered ☐ Deliver ONLY to addressee

RECEIPT
Received the numbered article described below

REGISTERED NO.
CERTIFIED NO. 777038
INSURED NO.
DATE DELIVERED FEB 26 1975

SIGNATURE OR NAME OF ADDRESSEE (Must always be filled in)
1. Marine Engineers Beneficial Assoc. AFL-CIO
SIGNATURE OF ADDRESSEE'S AGENT, IF ANY
2. K Keane
SHOW WHERE DELIVERED (Only if requested, and include ZIP Code)
3.

SENDER: Be sure to follow instructions on other side

PLEASE FURNISH SERVICE(S) INDICATED BY CHECKED BLOCK(S)
(Additional charges required for these services)

☐ Show address where delivered ☐ Deliver ONLY to addressee

RECEIPT
Received the numbered article described below

REGISTERED NO.
CERTIFIED NO. 777039
INSURED NO.
DATE DELIVERED 2/27/75

SIGNATURE OR NAME OF ADDRESSEE (Must always be filled in)
1. American President Lines
SIGNATURE OF ADDRESSEE'S AGENT, IF ANY
2. [illegible]
SHOW WHERE DELIVERED (Only if requested, and include ZIP Code)
3.

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE MAY 06 1975

TO:	FROM:
Mr. Eric E. Smith 170 Concourse Village West Bronx, New York 10451	Equal Employment Opportunity Comm. New York District Office 90 Church Street, Room 1301 New York, New York 10007
THIS CHARGE HAS BEEN DISMISSED FOR THE FOLLOWING REASON: ☐ NO REASONABLE CAUSE ☐ UNTIMELY CHARGE ☐ NO JURISDICTION ☐ FAILURE TO PROCEED	EEOC REPRESENTATIVE Ralph Munoz, District Counsel TELEPHONE NUMBER: 264-7161 CASE/CHARGE NUMBER: TNY 2-0491

If you want to pursue your charge further, you have the right to sue the respondent(s) named in this case in the United States District Court for the area where you live. If you decide to sue, you must do so within ninety (90) days from the receipt of this Notice; otherwise your right is lost.

If you do not have a lawyer or are unable to obtain the services of a lawyer, take this Notice to the United States District Court which may, in its discretion, appoint a lawyer to represent you.

An information copy of this Notice has been sent to the respondent(s) named in this case.

If you have any questions about your legal rights or need help in filing your case in court, call the EEOC representative named above.

Hilton McAllister

District Director

cc:

American President Lines
29 Broadway
New York, New York 10006

Marine Engineers
Beneficial Association, AFL-CIO
17 Battery Place
New York, New York 10006

EEOC FORM APR 73 161 CHARGING PARTY'S COPY

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CAPTION

PLAINTIFF's RULE 9(g) STATEMENT

Filed : August 27, 1976

Pursuant to General Rule 9(g) of the Southern District of New York, the plaintiff, ERIC SMITH, hereby responds to the nine (9) material facts asserted by the defendant, American President Lines,:

1. The Defendant asserts that,

> "On October 14, 1970 plaintiff herein, Eric Smith, filed a charge of discrimination with the New York State Division of Human Rights (Case No. C-22329-70) based upon his discharge from employment with American President Lines Ltd., on October 5, 1970."

The Plaintiff ADMITS the fact.

2. The defendant asserts that,

> "On September 17, 1971, the New York State Division of Human Rights issued its opinion finding that plaintiff, Eric Smith, had not been discriminated against by American President Lines, Ltd. when it discharged him on October 5, 1970."

The Plaintiff admits that the State Division failed to find that the defendant discriminated against him in discharging him but denies that the State Division found that the defendant had not discriminated against him in any respect. The plaintiff asserts that the State Division decision states, in part,

"I find that Respondents American Presidents Lines, Ltd. and Jack Donald Benjamin denied Complainant equal terms, conditions and privileges of employment because of Complainant's color or race, in violation of the Human Rights law."

3. The defendants asserts that,

> "On September 30, 1971, plaintiff filed an appeal to the Appeal Board of the New York State Division of Human Rights (Appeal No. 1074), which was not sustained."

The plaintiff admits that the appeal was filed on or about September 30, 1971, but denies that it was not sustained. The plaintiff withdrew his appeal on February 10, 1972.

4. The defendant asserts that,

> "The file of the New York District Office of the Federal Equal Employment Opportunity Commission (EEOC) contains three charges identical in essence but not in wording based upon an alleged discriminatory practice by American President Lines, Ltd. in its discharge of plaintiff Eric Smith, on October 5, 1970 which also is the basis of the complaint herein."

The plaintiff DENIES the assertion and states that the charges in the EEOC case file, Exhibits 4 and 5 attached to the defendant's Memorandum in Support, speak for themselves. They are not "identical in essence" in that they raise issues of the defendant MEBA's conduct. In addition, they are only partially "the basis of the complaint herein" as the EEOC's

investigation flowing from the charges included in its scope the defendant's activity at the Coast Guard against the plaintiff and the defendant union's refusal to fairly represent the plaintiff - both of which are set forth in the Complaint's allegations. Moreover, the EEOC case file contains an additional charge not referred to by the defendant in its moving papers - a charge of retaliation filed by the plaintiff against the defendant MEBA on February 20, 1975, to which the EEOC has assigned the Charge Number TNY 5-0600. This charge refers to the original Charge No. TNY 2-0491 and raises the issue of union retaliation in attempting to deny him full membership - also an issue raised in the Complaint.

5. The defendant asserts,

> "Two of the charges filed with the EEOC were dated November 19, 1971, and the Commission's files indicate that no case file number was assigned to either of these charges. Neither of these charges was served upon defendant, American President Lines, Ltd."
> The plaintiff DENIES the assertion. The EEOC's file reflects that the plaintiff's two charges of November 19, 1971, were received by the EEOC on that date and that the subsequent charge filed on November 24, 1972, was an amendment to the earlier charges. The EEOC file also reflects that the case was assigned the Charge Number TNY 2-0491 and the Case No. YNY 4-389. The file further reflects that the defendant has received copies of the charges.

6. The defendant asserts,

> "The third charge filed with the EEOC was dated November 24, 1972 and was assigned EEOC No. TNY 2-0491. Although Section 706 (b) of the Civil

Rights Act 42 U.S.C. 2000e-5(b) requires that the party charged be informed within 10 days after the filing of the charge, no such notice was served upon or received by American President Lines, Ltd. within that period. The first notice of such charges was received by American President Lines, Ltd. on March 8, 1973 when the EEOC informed it of the charge in a letter requesting certain information in regard thereto."

The plaintiff lacks sufficient information to know what did or did not transpire between the EEOC and the defendant during the period referred to. The plaintiff denies that the Charge Number TNY 2-0491 was ascribed to the November 24, 1972 charge exclusively, but states that the charge number was assigned to the entire case pending before the EEOC.

7. The defendant asserts,

"On December 4, 1972, the New York State Division of Human Rights informed plaintiff that this rights under the New York Human Rights Law has been exausted."

The Plaintiff ADMITS the assertion.

8. The defendant asserts,

"On May 6, 1975, plaintiff received a "Notice of Right to Sue" from the EEOC."

The plaintiff states that the document referred to was received by him through his attorney on May 7, 1975.

9. The defendant asserts,

"The complaint in this action was filed on May 28, 1975."

The plaintiff ADMITS the assertion.

Dated: New York, N.Y.
August 27, 1976

/S/
Co-counsel for Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

008813

ERIC E. SMITH, Plaintiff, v. AMERICAN PRESIDENT LINES, LTD.; et al., Defendant.	CIVIL ACTION NO. 75 Civ. 2507 (CMM)

REPLY MEMORANDUM IN SUPPORT OF MOTION OF DEFENDANT AMERICAN PRESIDENT LINES TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

On May 28, 1975, Plaintiff filed his Complaint in the above-entitled case. In so doing, Plaintiff asserted that the Court had jurisdiction over his claim under the Civil Rights Act of 1964, as amended in 1972, 42 U.S.C. §2000(e) et. seq., the Civil Rights Act of 1866, 42 U.S.C. §1981, and the Labor Management Relations Act, 29 U.S.C. §151 et. seq. On August 18, 1976, Defendant American President Lines, Ltd. (hereinafter "Defendant") filed a Motion to Dismiss or in the Alternative for Summary Judgment contending that jurisdiction did not lie under any of the above-enumerated Acts. In its opposition, Plaintiff concedes that the Court lacks jurisdiction under 42 U.S.C. §1981 insofar as the moving Defendant is concerned, Plaintiff's Memorandum, pp. 9 and 10. Plaintiff further concedes that the Court lacks jurisdiction over Defendant under 29 U.S.C. §151 et. seq., Plaintiff's Memorandum, p. 10. Accordingly, Defendant is entitled to a grant of its Motion insofar as both of these Acts are concerned.

Plaintiff does contend that the Court still has jurisdiction under 42 U.S.C. §2000(e). In its initial pleading, Defendant had contended that as to this Act Plaintiff was barred both by the jurisdictional time limits and by the doctrine of res judicata. Plaintiff disagrees with both

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assertions. As to the doctrine of res judicata, the issue turns on the continued viability of the Second Circuit's decision in Voutsis v. Union Carbide, 452 F.2d 889 (2nd Cir. 1971). This will will not be reargued in this pleading.

As for the statutory time period, Plaintiff concedes that the charge with the Equal Employment Opportunity Commission was filed beyond the 300-day requirement set forth in 42 U.S.C. §2000e-5(e), Plaintiff's Memorandum, p. 3. However, Plaintiff asserts that the statutory time period is not jurisdictional and that it can be tolled by equitable consideration. Applying this supposed principle, Plaintiff asserts that the period was tolled because

> at no time during his presence on the company's ship in 1970 and at no time during his periodic and frequent visits to his union offices - continuing to August 20, 1976 - has he seen a notice posted advising employees and union members that if they feel they have been discriminated against on account of their race or other prohibited bases, they should file charges with the EEOC.

Plaintiff's Memorandum, pp. 4 and 5.

It is Defendant's position that the statutory period is jurisdictional and that even if it were not the alleged failure to post would not constitute an equitable ground in which to toll the running of the statute.

There exists a long line of cases holding that the limitation periods in the Civil Rights Acts are jurisdictional, e.g., Wong v. The Bon Marche, 508 F.2d 1249 (9th Cir. 1975); Genovese v. Shell Oil Co., 488 F.2d 84 (5th Cir. 1973); Archuleta v. Duffy's, Inc., 471 F.2d 33 (10th Cir. 1973); Goodman v. City Products, 425 F.2d 702 (6th Cir. 1970); Huston v. General Motors, 477 F.2d 1003 (8th Cir. 1973); Stebbins v. Nationwide Insurance Co., 469

F.2d 268 (4th Cir. 1972); Cleveland v. Douglas Aircraft, 509 F.2d 1027 (9th Cir. 1975); Harris v. National Tea, 454 F.2d 307 (7th Cir. 1971); Hinton v. CPC International, 10 FEP 1423 (8th Cir. 1975); Smith v. OEO For Arkansas, 13 FEP 132 (8th Cir. 1976). This is also the thrust of the Supreme Court decisions in McDonnell Douglas v. Green, 411 U.S. 792, 798 (1973); Johnson v. Railway Express, 421 U.S. 454 (1975); Brown v. GSA, 12 FEP 1361 (U.S. 1976). Plaintiff cites only one Court of Appeals decision to the contrary, Reeb v. Economic Opportunity Atlanta, 516 F.2d 924 (5th Cir. 1975).

Contary to the implication contained in Plaintiff's Memorandum, pp. 6-8, there are no Court of Appeals decisions from the Second Circuit clearly ruling on this issue. Voustis v. Union Carbide Corp., 452 F.2d 889 (2nd Cir. 1971), concerns a premature filing; Weise v. Syracuse University, 522 F.2d 397 (2nd Cir. 1975) concerns the relation back of a second charge to a timely filed first charge; and DeMatteis v. Eastman Kodak, 511 F.2d 306 (2nd Cir. 1975), mod. 520 F.2d 409 (2nd Cir. 1975) relates to when the 90-day period runs from an EEOC notice when the EEOC gives erroneous advice to a claimant. Although not on point, the cases do indicate that the Court viewed the statutory time periods as jurisdictional. For example, see Weise, supra, at p. 413, fn. 27. Although there are no decisions from this Court of Appeals, there are three cases from the Southern District of New York holding that the statutory time period is jurisdictional, see Hetch v. CARE, 351 F. Supp. 305, 310 (S.D. N.Y. 1972); White v. Texaco, 7 FEP 367 (S.D. N.Y. 1973); and Cates v. Trans World Airlines, 13 FEP 201, 203 (S.D. N.Y. 1976).

Even assuming the statutory time periods are not jurisdictional in nature, Plaintiff has set forth no equitable

ground for extending the time period beyond the 300 days. Plaintiff contends that because he did not "see" the EEOC notices he would be entitled to an extension of time. For this proposition, he cites Skoalund v. Singer Co., 403 F. Supp. 797, 12 EPD, Para. 11,041 (D. N.H. 1975). It must be first noted that Plaintiff is not contending that the notices were not posted but only that he did not see them nor does Plaintiff contend that, even though he might not have seen them, he was unaware of, or misled as to, his rights under the Civil Rights Act of 1964, as amended in 1972 concerning the 1970 events. It is highly unlikely that any black in America is unfamiliar with the Civil Rights Act and the Equal Employment Opportunity Commission, particularly a plaintiff such as Mr. Smith who has been engaged in numerous litigations and a merchant seaman and a licensed ship's engineer for over a quarter of a century and who was admittedly aware of his rights under the New York State Division of Human Rights.

There is no known case holding that the posting or non-posting of various government notices acts as a waiver of any statutory time period. Indeed, the opposite could be said to be true, see Aarid Van Lines, Inc., 22 WH 1189, 1190, Fn. 1 (U.S. Dep. of Labor 1976). Ignorance of the law has long been held not to excuse compliance with statutory time periods, c.f., Wong v. Bon Marche, 508 F.2d 1249 (9th Cir. 1975). In fact, this was what was held in a subsequent determination by the Court in Skoalund v. Singer Co., 13 FEP 243 (D. N.H. 1975), where the Court stated that plaintiff should have known his rights under the age discrimination law and that "he cannot now claim that his ignorance is due solely to defendant's alleged failure to post notice of ADEA as required by 29 U.S.C. §627. In this case, Plaintiff does not even assert (nor could he) that he was unaware of the Civil Rights Act. Consequently,

he lacks even a minimal equitable factor to support any extension of the statutory time period.

Clearly, the plaintiff has not presented any material facts which would warrant the denial of summary judgment and the introduction in this Court of plaintiff's belated lawsuit. As the Court said in United States v. Matheson, 532 F. 2d 809 (1976) at page 813:

> ".... summary judgment should not be denied where the only issues raised are frivolous or immaterial ones which would simply serve to provide an exercise in futility or a purposeless trial for the district court, particularly where no jury has been demanded."

CONCLUSION

For the reasons set forth in Defendant's initial pleading and its instant pleading, this Court should grant the motion of Defendant American President Lines, Ltd. to Dismiss or in the Alternative for Summary Judgment.

Respectfully submitted,

Robert J. Hickey

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Attorneys for Defendant,
American President Lines, Ltd.

September 3, 1976

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CAPTION

OPINION

Filed: December 14, 1976

METZNER, D. J.:

This is suit pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq. The jurisdiction of this court is invoked to secure protection of and to redress alleged depriviation of rights secured by 42 U.S.C. §2000e et seq., 42 U.S.C. §1981 and 29 U.S.C. §151, et seq.

Defendant American President Lines, Ltd., pursuant to Rules 12(b)(1), (6) and 56 of the Federal Rules of Civil Procedure, moves to dismiss the complaint or in the alternative to grant summary judgment. Defendant argues that this Court lacks jurisdiction over the complaint and that the complaint is barred by the doctrine of res judicata.

Defendant's motion is denied as to the lack of jurisdiction claim with regard to 42 U.S.C. §2000e et seq.

The complaint is timely filed under 42 U.S.C. §2000e-5(e) which provides that the charge can be filed within thirty days after receiving notice that the state

has terminated proceedings initially instituted in the state. The fact that plaintifff filed a charge with the federal commission prior to the termination of the state proceedings will not serve to bar the plaintiff's case. Voutsis v. Union Carbide Corporation, 452 F. 2d 889 (2d Gir. 1971), cert. denied, 406 U.S. 918 (1976).

Defendant's motion is granted dismissing allegations arising under 42 U.S.C. §1981 contained in the complaint in paragraphs 6(A-D) and 7(B-D). Plaintiff has admitted that these are timed barred based on Section 214 (2) of the New York C.P.L.R.

Plaintiff also concedes that the court lacks jurisdiction over defendant based upon a violation of the duty of fair representation. Accordingly, defendant's motion to dismiss is granted with regard to plaintiff's allegations under 29 U.S.C. §151 et seq.

Finally, defendant's argument that the complaint is barred by the doctrine of res judicata is without merit. Voutsis v. Union Carbide Corporation, supra at 894. The 1972 amendment to 42 U.S.C. §2000e-5(b) provides only that the Equal Employment Opportunity Commission "accord substantial weight to final finding and orders made by State or local authorities. . . ." Voutsis remains as the governing case in the Second Circuit.

So ordered.

Dated: New York, N.Y.
December 13, 1976

CHARLES M. METZNER
U. S. D. J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

010431

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ERIC E. SMITH, :

Plaintiff, :

v. :

AMERICAN PRESIDENT LINES, LTD., and MARINE ENGINEERS' BENEFICIAL ASSOCIATION, AFL-CIO, :

Defendants. :

----------x

NOTICE OF MOTION FOR REARGUMENT

CIVIL ACTION NO. 75 CIV. 2507 (CMM)

S I R S:

PLEASE TAKE NOTICE that upon the annexed memorandum, defendant, American President Lines, Ltd., will move this Court pursuant to Rule 9(m) of the General Rules of the Southern and Eastern Districts of New York at Room 2201, United States Courthouse, Foley Square, New York, New York on the 6th ~~day of January, 1977 at~~ 10:00 in the forenoon or as soon thereafter as counsel can be heard for reargument of the motion of the said defendant to dismiss the complaint or for summary judgment (denied in the opinion and order of the Honorable Charles M. Metzner, filed December 14, 1976) and on such reargument to dismiss the complaint, on the ground that the Court (as shown in the annexed memorandum) overlooked the restrictive, "whichever is earlier" directive of 42 USC 2000e-5(e) fixing the time for the plaintiff to commence this action,

OR in the alternative, if the Court adheres to its original decision, for an order amending its order filed December 14, 1976 by certifying pursuant to 28 USC 1292(b) that, " ... a controlling question of law as to which there is substantial ground for difference

of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."

Dated: New York, New York
December 23, 1976

KIRLIN, CAMPBELL & KEATING

By: James J. Higgins
A Member of the Firm

Attorneys for Defendant,
American President Lines, Ltd.
120 Broadway
New York, New York 10005

To: MARKOWITZ & GLANSTEIN
Attorneys for Defendant
Marine Engineers Beneficial Association
50 Broadway
New York, New York 10004

JAMES I. MEYERSON,
NATHANIEL R. JONES,
WILLIAM D. WELLS,
and GEORGE E. HAIRSTON
Attorneys for Plaintiff
1790 Broadway
New York, New York 10019

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

ERIC E. SMITH, Plaintiff,	:	CIVIL ACTION NO. 75 CIV. 2507 (CMM)
v.	:	DEFENDANT AMERICAN PRESIDENT LINES, LTD.'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR RE-ARGUMENT
AMERICAN PRESIDENT LINES, LTD., and MARINE ENGINEERS' BENEFICIAL ASSOCIATION, AFL-CIO, Defendants.	:	

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Defendant, American President Lines, Ltd., by its undersigned attorneys, moves this Court to recon[illegible] its decision of December 13, 1976, insofar as th[illegible] Court denied Defendant's Motion for Summary Judgment as to the lack of jurisdictional claim with regard to 42 U.S.C. §2000e et. seq. In support of this Motion, Defendant states as follows:

On August 18, 1976, Defendant, American President Lines, Ltd., filed a Motion to Dismiss or in the Alternative For Summary Judgment. As part of that Motion Defendant argued that the Court lacked jurisdiction under the Civil Rights Act of 1964, as amended in 1972, 42 U.S.C. §2000e. The facts regarding the Motion were set forth in Defendant's Memorandum, pp. 1-5. This Court, in its December 13, 1976 decision, denied Defendant's Motion in this regard in the following language:

> The Complaint is timely filed under 42 U.S.C. §2000e-5(e) which provides that the charge can be filed within thirty days after receiving notice that the state has terminated proceedings initially instituted in the state.

The decision is in direct conflict with the language of the statute. Section 706(e) of the Act provides in relevant part:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred ..., except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency ..., such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, <u>whichever is earlier</u>, ...
> [Emphasis added.]

As can be seen, the jurisdictional time period where a complaint has been filed with a State agency is three hundred days after the alleged unlawful act or thirty days after receiving notice from the State, "<u>whichever is earlier</u>". The Court's decision inadvertently ignores the qualifying reference to "<u>whichever is earlier</u>". Thus, the fact that Plaintiff might have filed within the thirty days after receiving notice is not relevant if, in fact, three hundred days have expired after the unlawful act. In the instant case, the last act of alleged discrimination occurred on October 6, 1970. The three hundred days expired on August 1, 1971. The decision of the New York State Division of Human Rights on September 17, 1971, is approximately one and one-half months <u>after</u> the three hundred days had expired. Accordingly, the thirty days

alternative would not be applicable and the jurisdictional time period would not have been met[1].

Respectfully submitted,

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James J. Higgins

Vincent J. Lynch

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and

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Washington, D.C. 20036
(202) 296-4911

Attorneys for Defendant,
American President Lines, Ltd.

---

1. Even if the thirty-day time period was relevant, Defendant was not informed of the charge until March 8, 1973. Although Plaintiff apparently filed a charge on November 19, 1971, this was beyond the thirty-day period of the New York State Division of Human Rights' decision. There can be no waiving of the statutory jurisdictional time periods. See Electrical Workers v. Robbins & Myers, 45 United States Law Week 4088 (Supreme Court of the United States, December 20, 1976, a copy of which is annexed hereto).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ERIC E. SMITH, Plaintiff, v. AMERICAN PRESIDENT LINES, LTD., et al., Defendants.	CIVIL ACTION NO. 75 CIV. 2507 (CMM)

PLAINTIFF'S REPLY TO DEFENDANT'S MOTION FOR REARGUMENT

On December 23, 1976, the Defendant, American President Lines, Ltd., filed its motion to reargue its earlier motion to dismiss in this cause, based upon an alleged lack of timeliness in the filing of the plaintiff's administrative charges with the EEOC. In support of its motion to reargue, the defendant points out an asserted error in this Court's decision of December 14, 1976, in that the statute requires the filing of an EEOC charge within either 180 days of the unlawful event or, as in this case where the complainant proceeded before a State FEP agency, 300 days after the unlawful event or 30 days after receiving notice of termination of the agency proceedings, whichever is less.

In its short memorandum in support of the motion to reargue, the defendant correctly points out that the plaintiff's charge to the EEOC exceeded 300 days after his termination from their employ. The defendant argues that by applying the "whichever is less" clause to the above admitted fact brings to an end the question of this Court's jurisdiction over the case. Without restating in detail the arguments and additional pertinent facts set forth in our brief of August 27, 1976, the plaintiff would point out that the inquiry is by no means ended.

As is plainly set forth both in the Complaint itself, Pargraph 6(A-D), and in the plaintiff's affidavit attached to our brief in response of August 27, 1976, the termination of the plaintiff was only one link in the discriminatory chain of events forming the basis of the complaint. The defendant harassed the complainant while on board ship, terminated him at the end of the voyage, then initiated two unfounded Coast Guard proceedings for the purpose of having his license to work rescinded - all on account of the plaintiff's race. This series of events, all interrelated in terms of purpose and illegality, did not come to rest until the last Coast Guard proceeding had ended on September 2, 1971. This is the date from which the running of Title VII's statute of limitations commences.

A second set of facts raised by the plaintiff's affidavit attached to our earlier memorandum must also be considered. The plaintiff has stated, and the defendant has not denied, that neither the defendant union nor the company has posted, or more to the point, did not have posted in 1970, the EEOC posters required by Title VII. These posters are required by the Act so that persons like the plaintiff who feel they have been discriminated against will know of the availability of the EEOC. Mr. Smith states that he would have proceeded promptly to the EEOC the day of his discharge if he had known about it at that point. It was the defendants' illegal conduct which prevented him from doing so. This Court cannot in effect reward the defendant for that conduct. See, Burnett v. New York Central Railroad Co., 380 U.S. 424, 428 (1965), and cases cited therein. The recent case of I.U.E. v. Robbins & Myers, ___ U.S. ___, 45 USLW 4068 (1976), cited by the company in its support, is wholly inapposite and indeed supports the plaintiff's

position here: "In no way is this a situation in which a party has 'been prevented from asserting' his or her rights .... There is no assertion that Guy was 'prevented' from filing a charge with the EEOC within 90 days of October 25, 1971 ...." Id. at USLW 4070, footnote 10.

For the reasons set forth in our earlier brief and summarized here, the defendant's motion should be denied.

Respectfully submitted,

Nathaniel R. Jones, Esq.
1790 Broadway - 10th Fl.
New York, N.Y. 10010
(212) 245-2100

Attorney for Plaintiff

CERTIFICATE OF SERVICE

I, William D. Wells, attorney for Plaintiff herein, hereby certify that I have served copies of the foregoing upon counsel for the Defendants by causing same to be placed in the U.S. Mail, postage prepaid, addressed to them, this 7th day of January, 1977.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ERIC E. SMITH, Plaintiff, v. AMERICAN PRESIDENT LINES, LTD., et al., Defendants.	CIVIL ACTION NO. 75 CIV. 2507 (CMM)

PLAINTIFF'S REPLY TO DEFENDANT'S MOTION FOR REARGUMENT

On December 23, 1976, the Defendant, American President Lines, Ltd., filed its motion to reargue its earlier motion to dismiss in this cause, based upon an alleged lack of timeliness in the filing of the plaintiff's administrative charges with the EEOC. In support of its motion to reargue, the defendant points out an asserted error in this Court's decision of December 14, 1976, in that the statute requires the filing of an EEOC charge within either 180 days of the unlawful event or, as in this case where the complainant proceeded before a State FEP agency, 300 days after the unla event or 30 days after receiving notice of termination of th agency proceedings, whichever is less.

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position here: "In no way is this a situation in which a party has 'been prevented from asserting' his or her rights .... There is no assertion that Guy was 'prevented' from filing a charge with the EEOC within 90 days of October 25, 1971 ...." Id. at USLW 4070, footnote 10.

For the reasons set forth in our earlier brief and summarized here, the defendant's motion should be denied.

Respectfully submitted,

Nathaniel R. Jones, Esq.
1790 Broadway - 10th Fl.
New York, N.Y. 10010
(212) 245-2100

Attorney for Plaintiff

CERTIFICATE OF SERVICE

I, William D. Wells, attorney for Plaintiff herein, hereby certify that I have served copies of the foregoing upon counsel for the Defendants by causing same to be placed in the U.S. Mail, postage prepaid, addressed to them, this 7th day of January, 1977.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JAN 17 ...

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ERIC E. SMITH, Plaintiff, v. AMERICAN PRESIDENT LINES, LTD., and MARINE ENGINEERS' BENEFICIAL ASSOCIATION, AFL-CIO, Defendants.	DEFENDANT'S OPPOSITION TO PLAINTIFF'S REPLY TO MOTION FOR REARGUMENT CIVIL ACTION NO. 75 CIV. 2507 (CMM)

On December 13, 1976, this Court issued its decision granting in part and denying in part Defendant American President Lines, Ltd.'s Motion to Dismiss or, in the Alternative, for Summary Judgment. In so ruling, the Court held as to one of the issues that the Complaint was not time-barred under 42 U.S.C. §2000e-5(e). On this aspect of the case Defendant moved for reargument pointing out that the Court had reached its result because of an erroneous reading of the time periods contained in Section 706(e). On January 11, 1977, Plaintiff filed the instant Reply which it admits is not timely filed. In addition to its late filing, Defendant opposes the Reply for the following reasons:

I. Computation of Timeliness

A. Introduction

In its original Motion to Dismiss Defendant had pointed out that the last act of discrimination alleged in the Complaint occurred on October 6, 1970. Defendant American President Lines, Ltd. was first informed on March 8, 1973, that a charge of discrimination had been filed with the EEOC (The Defendant was never served with the charge.). It appears, however, that a charge had been filed by Plaintiff on November 19, 1971. The EEOC file contains two charges bearing that date. The first of these charges is dated "Nov. 19 1971." Complaint, Exhibit 4.

In response to the question "The most recent date on which this discrimination took place", Plaintiff had written "Oct. 5 1970". There is a second charge containing two pages, the first page being dated "Nov. 19, 1971" and the second page dated "11-19-71". Complaint, Exhibit 4. Both pages of the second charge refer to the discrimination as having taken place as of September 18, 1970. The second page refers not only to harassment on the voyage ending October 5 but termination "at the end of the voyage on Oct. 6th, 1970". The file contains a third charge dated "Nov. 24, 1972". Complaint, Exhibit 5. Other than the termination, which occurred on or before October 6, 1970, there was no reference in the charge to any other act of discrimination. The EEOC Determination, page 1, issued on May 23, 1974, refers to Plaintiff's allegations as referring only to "subjecting him to racial epithets" and "discharging him". Plaintiff's Opposition to Motion to Dismiss, Exhibit 22.

Plaintiff in paragraph 6 of the Complaint alleges as he had done in his charges that Defendant discriminated against him by harassment during the voyage and his termination at the end of the voyage. In addition, paragraph 6 raises, as additional violations of the Civil Rights Act, Defendant's alleged filing of charges of incompetence and misconduct against Plaintiff with the United States Coast Guard. These charges were filed on October 6, 1970. Plaintiffs' Opposition to Motion to Dismiss, Exhibit 2. Contrary to the above allegations in the Complaint, Plaintiff asserts in its present Reply that the discrimination was not the filing of the Complaint with the Coast Guard but the hearing on the Coast Guard Complaint which "did not come to rest until the last Coast Guard proceeding had ended on September 2, 1971".

The present pleading appears to concede Defendant's main argument in regard to the Motion for Reconsideration, i.e., that if the discriminatory acts occurred on or before October 6, 1970, the discrimination was untimely filed with the EEOC. The issues raised by the present Reply are:
(1) If the last act of discrimination occurred on September 2, 1971, was the charge timely filed on November 19, 1971; and
(2) If not, were the jurisdictional time periods tolled.

B. Last Act of Discrimination

1. Timeliness

As noted above, the Complaint in paragraph 6 refers to the filing of charges with the United States Coast Guard. It did not refer to any subsequent hearing even though the charges themselves were filed only one month after the hearing was completed. Plaintiff is attempting by its present pleading to, in fact, amend its Complaint. Plaintiff cannot raise legal arguments after the proceedings have commenced except in a manner consistent with normal rules of pleading. See Mt. Health City School District v. Doyle, _____ U.S. DLR No. 7, p. E-1 at E-2 (January 11, 1977).

Furthermore, the Complaint insofar as it refers to Complaints made with the United States Coast Guard by Defendant is beyond the scope of the charge. All three charges filed with the EEOC by Plaintiff relate to events leading up to and including Plaintiffs' termination on October 6, 1970. At no time did Plaintiff ever charge Defendant with discrimination because of the Defendant's filing of charges with the United States Coast Guard. This occurred despite the fact he had ample opportunity to do so. In Smith v. United Press International, 8 FEP 886, 890 (S.D.N.Y. 1974), this Court held that an individual may not allege in a Title VII action a claim not

presented to the EEOC. Since any claim based on Defendant's filing of the Complaints with the United States Coast Guard was not filed with the EEOC, this matter is beyond the scope of the Complaint in this case and cannot be considered in regard to the timeliness of the filing of the charge.

2. The Date of Defendant's Complaints Filed with the Coast Guard is the Controlling Date.

Even assuming Plaintiff can timely raise the issue of the Coast Guard Complaints, the alleged act of discrimination occurred on October 6, 1970, and not September 2, 1971. As noted, the Complaint refers to the filing of charges by Defendant against Plaintiff which were filed on October 6, 1970.[1/] The filing of the Complaint was a singular act which was completed on a given date, October 6, 1970. That the October 6, 1970, date is the correct one is supported by the recent decision of the Supreme Court in Operating Engineers v. Robbins and Myers, 42 LW 4066, 4067, 13 FEP 1813, 1815 (1976). Plaintiff in that case argued that the date governing the timeliness of his charge was not his termination but the date on which the arbitration hearing on the termination was completed. The Supreme Court disagreed and held that it was the date of the discharge and not the subsequent date of the hearing that controlled. Similarly, it should be in the instant case the October 6, 1970, date of Defendant's Complaints that should govern the timeliness of the charge. As noted above, if that date governs, then the charge would be untimely as being beyond the 300-day limitation.

1/ It is worth noting that although the Coast Guard found that while the evidence did not support Plaintiff's misconduct or incompetence, it also held that Defendant was not improperly motivated by racial prejudice in filing the charges. Plaintiff's Opposition to Motion to Dismiss. Exhibit 3, page 6.

3. Even if the September 2, 1971, Date is the Controlling Date, the Complaint is Untimely.

As pointed out in the original Motion for Reargument, Section 706(e) of the Civil Rights Act, 42 USC §2000-5(e) requires that a charge filed with the EEOC must be filed within three hundred days after receiving notice from that stage agency "whichever is earlier". The decision of the New York State Division of Human Rights was issued on September 17, 1971. Since the charge was filed on November 19, 1971, this is more than thirty days beyond the state agency's decision and is untimely.

4. Defendant is Entitled to Partial Summary Judgment As to Acts Occurring Prior to October 6, 1970.

The charges filed with the Equal Employment Opportunity Commission relate to alleged harassment of Plaintiff on a voyage which came to an end on or before October 5, 1970, and to Plaintiff's termination on or before October 6, 1970. Thus, the alleged ship harassment by its own terms came to end with the end of the voyage and the alleged termination came to end on the date of termination. The law is abundantly clear that a charge alleging termination cannot be continuing beyond that time. Operating Engineers v. Robbins and Myers, supra; Davidson v. Tapley, 11 FEP 573 (S.D.N.Y. 1975). Thus, in this regard, Defendant is entitled to a Motion for Summary Judgment as to the termination, and as to the harassment on a voyage which had ended by October 6, 1970.

II. Extension of Statutory Time Periods

Plaintiff again raises the question that the statutory time periods must be expanded because Defendant did not allegedly post the EEOC notice. In regard to the posting itself, this is discussed on pages 3-5 of Defendant's Reply to Plaintiffs' Memorandum in Opposition to Defendant's Motion. Nothing more need be said other than to again assert that it is absurd in this day to believe that a Plaintiff who has

been in Court as much as Plaintiff and who filed with a state agency in regard to discrimination is totally unaware that a federal agency exists for this purpose.2/ However, the Court need not concern itself with this since the Supreme Court in IUE v. Robbins and Myers, supra, held that the statutory time periods are jurisdicational in nature and cannot be tolled. The Supreme Court's decision is dispositive of the issue. Even if it were not, there is nothing in the Complaint indicating that in any way Defendant "prevented" Plaintiff from filing the charge. At most, even if Plaintiff's highly preposterous facts are accepted as true, there merely exists an omission on Defendant's behalf and not any deliberate act preventing Plaintiff from taking any action.

CONCLUSION

Defendant requests that this Court not accept this untimely filed Reply. If it does, it should, for the reasons stated above, reject Plaintiff's argument, grant reconsideration and dismiss the case.

Respectfully submitted,

/s/
Robert J. Hickey

/s/
James J. Higgins

2/ This lack of knowledge is particularly astounding when Plaintiff admitted in Deposition that he was in the United States when the Civil Rights Act was passed, that he regularly reads New York newspapers and national magazines and watches television, including newscasts. Deposition pp. 45-58. Furthermore, Plaintiff claims he has never seen an EEOC notice on any ship he has been on, not just that of Defendant. Deposition, p. 56.

/s/
Vincent Lynch

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Attorneys for Defendant
American President Lines, Ltd.

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CAPTION

OPINION

Filed: January 24, 1977

METZNER, D. J.:

Defendant moves for reargument. Reargument is granted.

This is a suit pursuant to Title VII of the Civil Rights Act of 1961, as amended, 42 U.S.C. §2000e, et seq. Defendant American President Lines, Ltd. in its motion for reargument seeks an order dismissing the complaint pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of jurisdiction.

This court's previous denial of the motion was based on a miscalculation of the time between the alleged discriminatory act and the filing of plaintiff's charge with the Equal Employment Opportunity Commission. Since plaintiff's charge was filed in excess of 300 days after his termination, plaintiff has not satisfied the time limits in 42 U.S.C. §2000-5(e). The original determination denying defendant's motion is recalled and the motion is now granted.

So ordered.

Dated: New York, N.Y.
January 21, 1977

CHARLES M. METZNER
U. S. D. J.

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CAPTION

STIPULATION AND ORDER

Filed March 18, 1977

Whereas, this Court, in reargument, granted the motion of defendant, American President Lines, Ltd., to dismiss the complaint, in a memorandum decision and order, dated January 21, 1977 and filed January 24, 1977, and whereas, the plaintiff agrees to abide by that determination as against defendant Marine Engineers' Beneficial Association, subject to its right of appeal, it is hereby,

STIPULATED AS FOLLOWS:

1. The allegations in the complaint against Marine Engineers' Beneficial Association for an alleged breach of that defendant's duty of fair representation based upon 29 U.S.C. §151 et seq. are withdrawn and the claim of the plaintiff for said alleged breach is hereby dismissed.

2. The plaintiff subject to the right of appeal therefrom, agrees that the Court's memorandum decision and order granting the motion of American President Lines, Ltd. to dismiss is also applicable to its

remaining claim against defendant Marine Engineers' Beneficial Association, with the same force and effect as if a determination on a separate motion by that defendant to dismiss had been made.

3. By reason of the foregoing, a final judgment may be entered dismissing the complaint and this action in its entirety, subject to the right of the plaintiff to appeal therefrom.

Dated: New York, New York
March 10, 1977

/S/
Co-Counsel for Plaintiff

/s/
Pacific Coast District, Marine Engineers Beneficial Association

/S/
Attorneys for Defendant, American President Lines, Ltd.

So ordered _____ day of March, 1977

/s/
U. S. D. J.

CAPTION

ORDER AND JUDGMENT OF DISMISSAL

Filed: March 18, 1977

The Court, having on reargument, granted the motion of defendant, American President Lines, Ltd. to dismiss the complaint in the memorandum decision and order of the Honorable Charles M. Metzner dated January 21, 1977 and filed January 24, 1977 and the parties by stipulation and order having agreed 1) that the plaintiff's claim for the alleged breach by defendant Marine Engineers' Beneficial Association of a duty of fair representation be dismissed and 2) that the complaint also be dismissed against the Marine Engineers' Beneficial Association in accordance with the aforementioned memorandum decision and order of the Honorable Charles M. Metzner with the same force and effect as if a decision on a separate motion to dismiss by that defendant had been made, subject to the right of plaintiff to appeal therefrom it is therefor

ORDERED AND ADJUDGED that the complaint and this action be and are hereby dismissed.

Dated: New York, New York
March 18, 1977

/S/

U. S. D. J.

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